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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF ON BEHALF OF APPELLANT

EDWARD HALLE,
Attorney for Petitioner.

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Opinion Below

The opinion rendered by the United States Court of Appeals for the Third Circuit (102-108) * is reported in 159 F. 2d 798.

Jurisdiction

The order of the Circuit Court of Appeals affirming the judgment of conviction, was entered on February 11, 1947 (108), and Appellant's petition for rehearing was denied by the said court, by order entered March 21, 1947 (109). The petition for writ of certiorari was granted on February 16, 1948, on rehearing (110).

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* NOTE: Numerical references are to the pages of the printed transcript of record unless otherwise indicated.

Questions Presented

1. Was the appellant's conviction based on evidence illegally obtained which should have been suppressed?

2. Was sufficient evidence presented to substantiate a judgment of conviction on Counts 1, 2 and 3 of indictment 3829 C .

3. Does Count 3 of the said indictment allege an offense?

4. Was sufficient evidence presented to substantiate a judgment of conviction on Counts 1 and 2 of indictment 3875 C.

5. Did the Trial Court properly instruct the Jury on the law of the case?

6. Was it error for the Trial Court to preclude defense counsel from developing the cross examination of Government witnesses with regard to the similitude of certain evidence produced by the Government to United States currency.

7. In view of the fact that Count 3 of indictment 3829 C is inconsistent with Counts 1 and 2 of indictment 3875 C. Was it proper to sentence the Appellant to consecutive terms of imprisonment?

Statement

This matter comes before this Court on a writ of certiorari directed to United States Circuit Court of Appeals for the Third Circuit which affirmed a judgment of conviction of Appellant at a trial had before a United States District Judge for the District of New Jersey, and a Jury.

There are two indictments Cr. 3829 C-Cr. 3875 C (2-5, 10-12). Counts 1 and 2 of indictment Cr. 3829 C charge the appellant, Lustig, and one Reynolds, with counterfeiting obligations of the United States. Count 3 thereof charges

possession of certain materials with intent to use same for counterfeiting.

Indictment Cr. 3875 C charges in Counts 1 and 2 possession of obligations executed in part after the similitude of obligations of the United States.

All of the Counts in both indictments are alleged in violation of Revised Statute 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116; 18 U. S. C. A., Sec. 264.

The appellant Lustig was sentenced to serve five years on indictment Cr. 3829 C and three years on indictment Cr. 3875 C, such sentences to run consecutively.

Facts

On March 6, 1946, the appellant Lustig registered at the Walt Whitman Hotel in Camden, N. J., for himself and one Reynolds under the respective names of Dr. Edward E. Fisher and Joe Binstock, and was assigned to Room 402 (R. 33, 34).

On Sunday, March 10, 1946, at about 10:30 in the morning, Mrs. Sarah Lindsay, a chambermaid at the Walt Whitman Hotel, in Camden, N. J., went to Room 402 to make up the room (R. 51). After her lunch, at about 11:30 (R. 52), she went up to Room 404, which had a connecting door to Room 402, to strip the bed, heard a noise "like glass hitting against glass or metal hitting against metal" in Room 402, and looked through the keyhole (R. 52). She saw Lustig standing there, with a piece of green wet paper. He gave a piece of it to Reynolds (R. 52). She also saw a magnifying glass (R. 53). She went to look through the keyhole again and saw Lustig laughing. He put a little glass bottle on the desk and then laid down a little paint brush. She did not bother looking again (R. 53).

The first time she had looked through the keyhole, Lustig's back was toward her and she could not see what was in front of him (R. 58).

The second time, he was facing sideways, looking through "this microscope" (apparently the magnifying glass) at something on the desk which she could not see (R. 58), but he later picked up some stuff that "seemed to be white". It looked like this was "greenish stuff", and Mrs. Lindsay did not know what it was, but presumed it was money (R. 59). She then went to the housekeeper, Mrs. Brown, and told her what she saw (R. 59). The only time she saw the above mentioned items was when she looked through the keyhole. She saw none of these things when she cleaned Room 402 on Thursday, Friday, Saturday and Sunday (R. 59, 60).

Norwood G. Greene, U. S. Secret Service Agent went to the Walt Whitman Hotel at about 2 o'clock of that afternoon, after receiving two telephone calls, first from the office of the Camden Detective Division, and then from the Manager of the Walt Whitman Hotel, who gave his name as Mr. Shires (R. 60). Detective Arthur of the Camden City Police, who called him first, said that a man at the Walt Whitman Hotel had said that there was some violation of the Currency Laws of the United States and asked Agent Greene whether he wanted one of the managers of the hotel to call him, to which Greene answered "Yes" (R. 67). Mr. Shires then called from the hotel and said he thought there was a violation in one of the rooms of the hotel involving counterfeiting money (R. 67, 68). Greene went to Room 404 at that time and looked through the keyhole. He saw Lustig walking up and down the room, but did not see Reynolds. He saw nothing else, except three suitcases and a desk and what appeared to be a magnifying glass on top of the desk (R. 68). He was at the keyhole for about fifteen minutes and heard voices, but could not distinguish what was said (R. 68, 69). He also spoke to Mrs. Lindsay, after he looked through the keyhole, who told him

that she had seen on the table "what looked like money" and saw the Doctor (Lustig) handling it (R. 68).

Greene then went over to Detective Headquarters and saw Detective Arthur and told him that he had seen no counterfeiting going on and that he was satisfied that there was no counterfeiting going on (R. 69). It was then about 2:30 o'clock (R. 70).

Capt. Koerner, of the Camden City Detective Bureau (R. 13) *was at home* on the 10th day of March, 1946, when he received a call from City Detective Arthur at about 2:30 in the afternoon (R. 20). As a result of that telephone call, he went to his office at City Hall, arriving at 2:45 o'clock, and found Detective Arthur, Detective Fleiderer and Agent Norwood Greene of the U. S. Secret Service, in the office (R. 20, 21). Detective Arthur told him that Agent Greene wanted him and Greene then explained the case to him. He told Koerner that he had gone over to Room 404, which was next to Room 402; that he had not seen anything, but that his information led him to believe that there was something going on in Room 402 and he mentioned the names Dr. Fisher and Binstock to Capt. Koerner (R. 21). This conversation between Koerner and Greene lasted about a half hour (R. 21).

Koerner then called Sgt. Murphy, who was not on duty that Sunday, at his home, and asked him if the name Binstock came to his mind as being a racehorse man or bookie, or something like that, which Sgt. Murphy verified (R. 21). This call was made at about 3:15 o'clock (R. 21). At about 20 to 25 minutes after three, Koerner went to the Walt Whitman Hotel, checked the registration and found the names Binstock and Dr. Fisher, and then, at about 3:45, went to the home of the Clerk of the City Police and got a warrant for Binstock and Fisher for violating a Camden City ordinance in not registering as criminals after being

in the City of Camden for twenty-four hours (R. 14, 21, 22).

Koerner had no information whatever that Dr. Fisher (Lustig) was a known criminal, but stated that he knew Binstock to be a confidence man (R. 22). At about 4 o'clock, Koerner, Murphy and Detectives Fleiderer and Arthur went back to the Walt Whitman Hotel, got a key from the desk and went up to Room 402. Lustig and Reynolds were not present (R. 23). The room was in order and two brief cases and a hand bag were on the left side of the room (R. 23). They searched the room and found a tray in the bureau drawer (R. 14) and found various articles in one of the brief cases, such as trays, paper cut to the size of United States currency, some bottles, brushes, eyebrow tweezers, magnifying glass, a stick of wood three inches wide by fourteen inches long, a wooden cylinder six and a half inches long, with a piece of cloth wrapped around it, a reverse impression on paper of the face of a $100 Federal Reserve note (Ex. G-17), a reverse impression on paper of the back of a $100 Federal Reserve note (Ex. G-18), and a reverse impression on paper of the back of a $10 certificate (Ex. G-19) (R. 15-18). After the discovery of these articles, Agent Greene was called at about 5 o'clock (R. 18, 24, 25, 71). He had been waiting in the City Detective Bureau from 2:30 until 5 o'clock when he received the call (R. 72, 73). Sgt. Murphy told Greene that it looked like those people were making counterfeit money and that he better come over. When he arrived at the hotel, all of the material that had been taken out of the brief case was on the bed (R. 74). Capt. Koerner and Sgt. Murphy then put the exhibits back in the brief cases (R. 74).

At about 6 o'clock, Lustig and Reynolds returned to room 402, and were searched (R. 18, 19). Then Lustig admitted ownership of the bag (Exhibit G 15) from which the above mentioned material were taken (R. 19, 20) and the

other brief case. However, he did not admit ownership of the three impressions (R. 39). Reynolds said that the large suitcase belonged to him (R. 38). It was then ascertained that Reynolds was not Joseph Binstock and that neither Lustig nor Reynolds were Joseph Binstock (R. 38).

Lustig stated at that time that he was not there to pass counterfeit money, just to sell the idea of how to make an easy living (R. 20, 30). All of the evidence found was then turned over to Federal Agent Greene (R. 20).

Lustig and Reynolds were then taken over to the Detective Bureau at approximately 7 o'clock and remained there until 11 o'clock in the evening (R. 29, 30). During that time Lustig stated to Capt. Koerner that he was there to show somebody how to operate the machine (R. 29, 30).

Federal Agent Greene after the arrest examined what was found and was then satisfied that there was counterfeiting going on and signed a complaint on Monday, the next day. (R. 71).

Apparently, none of the money taken from Lustig or Reynolds was used in making the impressions which were put in evidence (R. 71, 72).

At the trial, Lustig took the witness stand in his own defense. He stated that Reynolds called him up to come to Camden (R. 78, 79) to perfect a device known as a money machine; that he was to show a Mr. Weber how to operate the machine (R. 80). Weber paid him for demonstrating the machine to him (R. 80). The machine is a swindle (R. 80). The press was not used to make an impression, but that it was a money box where a switch was made to fool a person into investing in the machine (R. 82, 83). He testified that he did not make any of the impressions, but that Weber made them during his absence from the room, and that impressions could be made with Exhibits G 13 and G 14, which are a flat stick and a cylindrical stick (R. 84, 85).

POINT I

The District Court erred in failing to suppress evidence obtained by illegal search and seizure and in allowing the admission of such evidence on the trial.

The appellant Lustig was found guilty on the basis of certain evidence found in his room at the Walt Whitman Hotel in Camden, New Jersey. This evidence was obtained as a result of an illegal search and seizure. The circumstances surrounding the Government's acquisition of the evidence are outlined above in the statement of facts. Briefly, Federal Agent Norwood Greene was notified that a violation of currency laws was probably occurring in room 402 of the hotel. He made an investigation by looking through the keyhole and spoke to the chambermaid who originally raised the suspicion.

At this point we must assume that he could not have made an arrest on probable cause, nor did he have sufficient knowledge to obtain a proper search warrant. If the situation were otherwise, he would have made an arrest. However, he returned to Camden Police Headquarters and arranged for Captain Koerner of the City Police to meet him. It was a Sunday afternoon and Koerner was summoned from his home. He explained the situation to Koerner during a conversation which lasted a half hour and calmly waited at Police Headquarters while Koerner proceeded to follow up the leads supplied. In order to lend color of right to the ensuing raid staged by the Camden detectives, Koerner obtained a warrant for the appellant and one Reynolds, upon the grounds that they failed to register with his Department as "known criminals." At the time he obtained this warrant, he absolutely had no knowledge that the appellant, Lustig, was a

known criminal, and, as it later turned out, actually had no knowledge that Reynolds was a known criminal. It is submitted that this supposed warrant was a mere subterfuge. No color of right was added thereby which legalized the subsequent proceeding, but merely a faint blush of confusion designed to suffuse the illegal acts of the officers and create a picture of honest investigation. As soon as the City detectives found what Federal Agent Greene was looking for, he was called over to the hotel. He had fortuitously waited at Police Headquarters from 2:30 to 5:00 P. M. on a Sunday afternoon and as soon as he received the call from the City detectives, went over to the hotel and took charge. He was in and out of the room, waiting for the appellant to come back, took charge of the evidence found in the room, and was the chief party in interest in all of the further proceedings.

The investigation began with Greene and ended with him. The intervening acts of the City Police were merely links in the chain of Greene's work. The entire course of conduct in seizing the evidence herein constituted an illegal search and seizure by a Federal Agent and rendered all of the evidence so obtained inadmissible in a Federal Criminal Proceeding. Even viewed in the most favorable light for the Government, the search was at least a joint venture of the Federal and Municipal enforcement agencies.

In the case of *Gambino* v. *U. S.*, 275 U. S. 310; 72 L. Ed. 293, at page 314, Judge Brandeis stated the rule that:

> "Evidence obtained through wrongful search and seizure by state officers who are co-operating with Federal officials must be excluded. See *Flagg* v. *United States*, 233 Fed. 481, 483, approved in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182."

In the case of *Byars* v. *United States,* 273 U. S. 28, 71 L. Ed. 520, this Court stated on page 32:

> "While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is for the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' "

See also

Go-Bart Importing Co. v. *United States,* 282 U. S. 344, 356, 357; 75 L. Ed. 374, 382.

In *Crank* v. *United States,* 61 F. (2d) 981, it was held at page 983:

> "• • • where the search is made by state officers at the instigation of federal agents, or in co-operation with them, the Fourth Amendment is applicable."

The District Court stated in denying the motion to suppress in the instant case:

> "• • • But I think it has been established that there was a basis for the city authorities tc obtain their warrant of arrest, and then, in the event that there was no connection between the Federal authorities and the city authorities to the extent of an arrangement whereby the city authorities would go in and make an illegal raid, it seems to me the warrant being proper for the violation of the local law, they went in to make an apprehension under an arrest warrant, and they can make their search incident to that arrest. Even under the Federal Law, I think that would be a proper search and seizure. Even if that were not so, I do not see

> any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law. So, I will deny your motion and allow you an exception" (R. 76).

It is respectfully urged that the District Court erred in so finding. It should have been apparent to the Court that Greene, fearful of violating the Constitutional provisions against unreasonable searches and seizures, secured the cooperation of the municipal authorities, set their forces in motion, and rejoined them in the search immediately after they had made an entry of appellant's room. As a result, Greene received all of the evidence and charged the appellant with violation of Federal Law. The net result is to the same effect as if he had conducted the whole investigation himself and had alone illegally entered and searched the room.

Detective Sergeant Murphy of the Camden Police, when asked about Greene, testified as follows on the trial below:

> "Q. You knew he was a Federal Agent? A. Oh, positively. I have known him for a number of years" (R. 42).

Thus, it is readily apparent that the federal and municipal enforcement officers were well known to each other and cooperated together. Greene stated his plight to the police and they forthwith furnished him with what he wanted.

In *Fowler* v. *United States,* 62 Fed. (2d) 656, the Court in condemning the practice between police and federal agents of having the former make seizures which are illegal to the latter, stated on page 657:

> "It would be hardly consistent with the proper regard for the protection accorded by the Fourth Amendment to permit any department of the federal govern-

ment in this manner to set the amendment at defiance. The Supreme Court has frequently and emphatically declared that the amendment should be liberally construed in favor of the individual. *Boyd* v. *United States,* 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; *Byars* v. *United States,* 273 U. S. 28, 32, 33, 47 S. Ct. 248, 249, 71 L. Ed. 520; *Marron* v. *United States,* 275 U. S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374; *United States* v. *Lefkowitz,* 285 U. S. 452, 464, 52 S. Ct. 420, 76 L. Ed. 877; *Sgro* v. *United States,* 53 S. Ct. 138, 77 L. Ed. . . . (December 5, 1932)."

It is submitted that in the case at bar the search and seizure made by the police was made solely for the purpose of aiding the federal authorities.

Construing the Amendment for the protection of those for whom it was designed, it is evident that the District Court erred in not suppressing the evidence found by the federal and municipal officers working in unison. Greene could find nothing. He reported to Capt. Koerner, and spoke to him for a half hour. The Captain then went in and found what Greene wanted. Capt. Koerner's search was with the sanction of federal authority but without probable cause or warrant under federal law. Since there is no evidence upon which to base a conviction when the fruits of the illegal search are suppressed, it is respectfully submitted that the conviction of appellant be reversed.

POINT II

The evidence presented by the Government to substantiate Counts 1 and 2 of indictment Cr. 3829 C alleging the execution of engravings, prints, and impressions was insufficient.

The only testimony presented to show actual execution of impressions was that of Mrs. Lindsay, the chamber-

maid. She peeked through the keyhole of the appellant's room twice and the total sum and substance of what she saw and heard is as follows:

1. A noise "like glass hitting against glass or metal hitting against metal" (R. 52).
2. Lustig standing with a piece of wet green paper, a part of which he gave to Reynolds (R. 52).
3. A magnifying glass (R. 53).
4. Lustig putting a bottle and a little paint brush on the desk (R. 53).
5. A voice saying "That is enough of them, that is enough of them" (R. 53).
6. Both men looking at something green through a glass (R. 53).

It then developed on cross-examination that the first time she looked through the keyhole, Lustig's back was towards her, and she could not see what was in front of him (R. 58). The second time she looked she saw Lustig looking at something through the magnifying glass, which she could not see, but which she *presumed* was money (R. 58, 59).

This testimony, as modified on cross-examination, failed to show that the appellant did anything in relation to printing counterfeit money. There was no evidence presented to prove actual printing.

Captain Koerner testified on cross-examination that counterfeit money could be made with the equipment found in the appellant's room (R. 30-32). However, he also stated that he had no experience making counterfeit money and that he had no experience with a chemical solution he mentioned (R. 31). Mr. Richman, the United States Attorney, affirmed that the witness was not qualified (R. 32). The witness then stated that he *was not positive* that the equipment would make counterfeit money (R. 32).

John E. Ericson, a manufacturer of printers ink, was

called as an expert witness by the Government (R. 47). He testified that he used phenol (one of the items found in appellant's room) (R. 43) for cleaning ink, that is, to dissolve it (R. 47). He further testified that with phenol ink could be transferred from one paper to another "like a decalcomania almost" (R. 47). However, on cross-examination, he stated that *he had never done it* (R. 50).

The three impressions (Exhibits G-17, G-18, G-19) were found in appellant's bag at the hotel (R. 17-19). However, he denied ever seeing them before (R. 39).

Thus the evidence adds up to just this: a chambermaid heard some suspicious noises, and saw something *wet* and green; unqualified experts attempted to describe a process for counterfeiting; and impressions were found in appellant's room. Ergo, guilty of printing counterfeit money. Simple, yes, but equally absurd.

The prints that were found *packed in appellant's brief case* but a few hours after they were supposedly seen soaking wet were *dry* (R. 40). None of the money found in the possession of appellant or Reynolds matched the prints and an investigation revealed that no money had been passed by them between the time of the alleged printing and the arrest which matched the impressions (R. 71, 72). Captain Koerner stated that he did not think it possible that men who wanted to counterfeit money would be in a public hotel (R. 43).

If these prints had been soaking wet, and had been made at the time alleged, and had been kept packed in a brief case until a few hours later, any court should take judicial notice that they could not possibly have dried out. Anyone who has travelled knows that wet clothing packed in a suitcase remains wet for a very considerable length of time when shut off from the air in such a manner. However, the second fact is even more important since neither the appellant

nor Reynolds could have made these impressions without genuine bills *and such bills were not found on them!*

Thus, it is apparent that the Trial Court should have directed a verdict for the appellant. The evidence proferred to prove the printing of the notes was purely circumstantial. The result of this evidence was a triple inference that appellant printed the impressions.

Assuming that the three impressions were admittedly found in appellant's possession within a few hours after their printing, the Government still has to prove the printing of them as alleged. This was attempted by Mrs. Lindsay's testimony. The only direct evidence is that he was manipulating a wet green paper and then looked at something through the glass. Based on this, there is an inference that this paper had just been printed by the appellant. Superimposed on the first inference is the inference that what was printed was counterfeit money and then we have imposed the third inference that the alleged counterfeits, so printed, were the three impressions found. The result is an inference, on an inference, on an inference, which clearly is proof of nothing.

United States v. *Russo,* C. C. A. 3, 123 Fed. 2d, 420, at p. 422:

"Assuming, therefore, for the purposes of this case that Russo's constructive possession of the stolen cigarettes supplied proof of the requisite possession called for by the statute, certain it is that the implied possession is incapable of supporting an inference that the constructive possessor knew that the goods had been stolen. Cf. *Sorenson* v. *United States,* 8 Cir., 168 F. 785, 798, 799. This is but the logical result of the rule respecting the efficiency of circumstantial evidence. When circumstances alone are relied upon to establish a fact, they must themselves be directly proven and not presumed. *United States* v. *Ross,* 92 U. S. 281, 284,

23 L. Ed. 707. A presumption may not be rested upon another presumption. *United States* v. *Ross, supra,* 92 U. S. at page 283, 23 L. Ed. 707; *Dahly* v. *United States,* 8 Cir., 50 F. 2d 37, 43; *Ribaste et al.* v. *United States,* 8 Cir., 44 F. 2d 21, 23; *Gerson* v. *United States* 8 Cir., 25 F. 24, 49, 60; *Brady* v. *United States,* 8 Cir., 24 F. 2d 399, 404. The rule could not be otherwise if the legally permissible effect of circumstantial evidence is to receive due respect. In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. See *United States* v. *Baker et al.,* 2 Cir., 50 F. 2d 122, 123; *Glass* v. *United States,* 3 Cir., 231 F. 65, 68; *Hart* v. *United States,* 3 Cir., 84 F. 799, 808. • • •"

United States v. *Laffman,* C. C. A. 3, 152 Fed. (2d) 393, at p. 394:

"Direct evidence that appellant either made out or sent a false affidavit is lacking. The conviction must rest upon the circumstances surrounding the act which, if proved, would constitute the offense. The prosecution expresses agreement with the legal proposition urged by the appellant and recently reiterated by this Court that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' *United States* v. *Russo,* 3 Cir., 1941, 123 F. 2d 420, 423. Accord: *United States* v. *Tatcher,* 3 Cir., 1942, 131 F. 2d 1002. • • •"

There was no evidence to show that the appellant printed these impressions. The various inferences and presumptions made on what little and vague direct evidence there was were certainly insufficient to convict the appellant. Thus, it was error not to direct a verdict for acquittal and not to set aside the verdict of guilty as against the weight of the evidence.

POINT III

The third Count of Indictment Cr. 3829 C does not state an offense.

The third Count of the mentioned indictment alleges unlawful possession of the following items with intent to suffer same to be used in counterfeiting:

1. The impression of the face of a $100 note described in Count 1.

2. The impression of the back of a $100 note described in Count 1.

3. The impression of the back of a $10 note described in Count II.

4. A wooden press.

5. Package of bond paper.

6. Four packages of bond paper (4, 5).

It is submitted that this allegation does not constitute an offense. The pertinent part of the statute under which the Court is laid (R. S. 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116; 18 U. S. C. A. 264) reads as follows:

> "* * * Whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; * * *"

shall be guilty of a crime.

The gravamen of the offense hinges on the words "plate, stone, or other thing".

Surely, there is no argument that intent to use a plate or stone made after the similitude of any plate or stone

from which an obligation of the United States has been printed, will constitute a crime. However, a serious question is developed in construing the meaning of the words "or other thing". Do the mentioned words include printing presses, inks, and papers, or do they merely include items similar to plates and stones? Apparently, the drafter of the indictment ascribed to the former view, since he included as part of the ultimate facts constituting the crime the alleged possession by the appellant of a wooden press and some quantities of bond paper, along with the three printed impressions of the notes already described above. It is respectfully alleged that this position is entirely incorrect and untenable in view of the law relating to the interpretation of general and specific words contained in statutes.

Since this is a criminal statute, it must be more strictly construed in favor of the accused, and may not be enlarged or broadened to make criminal any act not defined by its words.

In the case of *U. S.* v. *Resnick,* 299 U. S. 207, 209, 210, 81 L. Ed. 127, 129, the court stated:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States* v. *Wiltberger,* 5 Wheat. 76, 95, 5 L. Ed. 37, 42; *Fasulo* v. *United States,* 272 U. S. 620, 628, 71 L. Ed. 443, 445, 47 S. Ct. 200."

It is the contention of the appellant that the particular words "plate, stone, or other thing" in effect mean "plate, stone, or similar thing" and do not include the various other parts of a printing press or a press itself or the papers on which such obligation may be printed.

In *People* v. *Ryan,* 274 N. Y. 149, the New York Court of Appeals held at pages 153, 154:

"Applying the doctrine of *ejusdem generis* to the expression 'No common carrier of other person' which is contained in subdivision 1(d), quoted above, the words 'No common carrier or other person' should be construed to mean 'No common carrier or other person engaged in a similar occupation,' that is, no other person engaged in commercial transportation of goods owned by or consigned to others."

In *United States* v. *Phez Co.* 28 Fed. (2d) 106, it was stated at pages 106, 107:

"To assert, however, that it is potable as a soft drink, is not to answer the question whether in the Revenue Act it was included among the beverages subjected to taxation as embraced in the words 'other soft drinks.' The act dealt with two distinct kinds of beverages: First, a fruit juice, namely, unfermented grape juice, derived by extracting by mechanical means the juice of the grape; and, second, certain named artificial soft drinks mixed, compounded, or manufactured from various ingredients, at the close of which enumeration, in order to prevent the exclusion of possible other soft drinks of the same nature and similarly manufactured, the lawmakers added the words 'and other soft drinks.'

Loju is not thus manufactured of divers ingredients; it is nothing but unfermented loganberry juice, diluted with water and sweetened, and it is not of the nature of the soft drinks which are specified. The case is one for the application of the rule of *ejusdem generis,* in accordance with which such terms as 'other,' 'other things,' 'others', or 'any other', 'when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described.' 25 R. C. L. 997, *United States* v. *Stever,* 222 U. S. 167, 174, 32 S. Ct. 51, 56 L. Ed. 145, *United States* v. *Nixon,* 235 U. S. 231, 35 S. Ct. 49, 59 L. Ed. 207. That sweet cider, which is sold in bottles as a beverage and is obviously a soft drink, is not included in the term 'other soft drinks,' is held

in the leading case of *Monroe Cider Vinegar & Fruit Co.* v. *Riordan* (C. C. A.) 280 F. 624, a decision which was followed in *Sterling Cider Co.* v. *Casey* (D. C.) 285 F. 885, and *Casey* v. *Sterling Cider Co.* (C. C. A.) 294 F. 426. • • •"

In the case of *In re Bush Terminal Co.*, 93 F. (2d) 659, which involved the construction of the words "oil, gas, gasoline and other combustibles", the Circuit Court for the Second Circuit held at page 660:

"• • • the fact that coal is a combustible does not make it taxable under the words 'other combustibles.' If 'combustibles' are supposed to include everything which is ordinarily intended to be burned, it would have been unnecessary for the statute to enumerate specifically the items which it does in section 1(k). The rule of *ejusdem generis* applies to such a statute. This rule is based on the theory that, if the Legislature had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character. *U. S.* v. *Stever*, 222 U. S. 167, 32 S. Ct. 51, 56 L. Ed. 145; *U. S.* v. *Chase*, 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117; *Lyman* v. *Commissioner*, 1 Cir., 83 F. 2d 811; *Hodgson* v. *Mountain & Gulf Oil Co.*, D. C. 297 F. 269; *People* v. *Ryan*, 274 N. Y. 149, 153, 8 N. E. 2d 313."

Thus, it is apparent that if Congress intended to include materials other than plates or stones in the very clause, it could have done so by the use of the general term "any thing" without the restricting words "plate" and "stone." However, having specifically limited the clause with the words "plate and stone" the words "or any other thing" must refer to any other thing in the nature of a plate or stone.

It would be absurd to conclude that Congress intended to make it a crime for anyone who possessed a printing press and did not possess a plate or stone made after the similitude of any plate or stone from which United States currency is printed should be convicted of a crime merely because he possesses such a printing press, even if it could be proved that he intended in the future to forge or counterfeit money.

If such were the case, any person in the United States who had any type of machine which was capable of printing would be subject to the penalties of the statute if he would make an admission to anyone that he intended to make counterfeit money. To carry the situation even further, anybody who possessed a package of bond paper and who would affirm that he intended to make counterfeit money would be guilty of violating the statute.

Such was not the intention of Congress. In using the specific words "plate" and "stone", it is apparent that Congress did not intend this clause to be extended to such ridiculous extremes, yet, in using the words "or other things" it was apparent that the intention of Congress was not to foreclose the statute merely to a plate or stone, but to include other similar apparatus which should be used in lieu of them.

As a further argument in support of this contention, it is submitted that a later clause in the statute makes it a crime to possess a paper similar to any distinctive paper adopted by the Secretary of the Treasury. It should be noted in such case, no criminal intent is necessary.

Where the Legislature passes a statute containing specific and general clauses an act prohibited by the specific may not be punished under the general.

In the case of *United States* v. *Chase*, 135 U. S. 255, 260, 34 L. Ed. 117, 119, this Court stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty* v. *Solly*, 26 Beav. 610, per Romilly, M. R.; *State* v. *Comr. of Railroad Taxation*, 37 N. J. L. 228. This rule applies wherever an Act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. * * *"

Therefore, the inclusion of the 500 sheets of bond paper in Count 3 of the mentioned indictment was unwarranted. If such paper was similar to a distinctive paper adopted by the Secretary of the Treasury, which was not proved at the trial, the appellant should have been prosecuted for the possession of the same under a Count for possessing distinctive type paper, not under the Count as alleged.

As regards the wooden press, it is urged that the arguments set forth above conclusively prove that possession of a wooden press with intent to counterfeit money is not a crime under the statute. Even assuming that the words "other thing" can be stretched to include this wooden press, no evidence was presented at the trial to show that such press was made after or in the similitude of any "thing" from which an obligation of the United States had been printed.

It should be noted here that the similitude mentioned in the statute would be a similitude to something used by the United States Government or one of its agencies in printing one of its obligations. This must be the true meaning, since otherwise the word "similitude" would not have been inserted.

The three remaining exhibits which are mentioned in the Count are the impressions of the face and back of a $100 note, and the back of a $10 note (Exs. G-17, G-18, G-19).

These three impressions are more particularly described in Counts 1 and 2 of the same indictment where it appears that they are described as prints in the likeness of Federal Reserve Bank Notes. They are also described in Counts 1 and 2 of Indictment Cr. 3875 C, which alleges possession of counterfeit obligations.

If they are counterfeit bank notes, it is conclusive that they are not plates, stones or other things, described by the clause of the statute under which Count 3 is laid.

There was no proof that any of these impressions could be used in conjunction with printing machinery as plates or stones or other similar things so as to produce obligations, after the manner in which obligations are produced by the United States Government or its agencies.

Some testimony was given at the trial that by taking one of these impressions and printing it on a blank piece of paper with the use of a chemical, the original of the bill would be printed again. It was further stated, however, that in doing so, some of the color would be lost. Thus, if these impressions were to be used in printing Federal Reserve notes, the product would be imperfect and the chances are, if a second print would be attempted, it would be much more imperfect.

These three pieces of paper could not possibly have been intended by Congress to have been included in the words "other thing" similar to a plate or stone in any manner made after the similitude of any plate, stone or other thing from which an obligation has been printed.

The devices which would come within the statute are such devices which are similar to plates or stones used by the United States Government in printing its obligations. Such

plates cannot be made in a short time or in the manner within which these three pieces of paper were printed. They would, of necessity, have to be made by some elaborate, painstaking and time-consuming process on material which is durable enough to withstand the printing of many impressions.

It is common knowledge that the United States Government uses every method and means at its command to render the process of counterfeiting money virtually impossible, if not impracticable. (See *Minnella* v. *U. S.*, 44 Fed. [2d] 48, 49.)

The District Court should have taken judicial notice that these three impressions were so foreign to any plate, stone or other thing in the similitude of any plate, stone or other thing used by the United States Government, in printing money, that a verdict of acquittal should have been directed for the appellant.

In *United States* v. *Woods,* 66 Fed. (2d) 262, which involved a violation of this clause of the statute, the defendants were charged with having in their possession a false plate in the similitude of a plate from which lawful $10 Federal Reserve notes are printed and that they intended to use the plate to forge and counterfeit $10 Federal Reserve notes.

In pertinent parts of the decision, relating to the making and engraving of steel plates, the Court stated at page 262:

> "Early in 1931 he began to work on one in an attic in Providence, Rhode Island. After several months he had a face plate for printing $10 Federal Reserve notes engraved but for the center part of the bill."

The Court continued at page 263:

> "The front plate was finished either late in July, 1931, or early in August of that year, * * *. Mills worked on the back plate * * * until it was finished sometime late in the following October."

It is apparent, therefore, that a plate which comes within the prohibition of the statute is difficult to make and requires considerable time for the engraving.

It is submitted that the statute was passed by Congress to prevent the printing of unlimited quantities of spurious obligations, not to prevent a single imperfect reproduction of a note by means of the simple device presented on the trial below.

It is therefore respectfully submitted that Count 3 of Indictment Cr. 3829 C does not allege an offense under the statute, and that the trial court erred in permitting the evidence presented in proof thereof to be submitted to the jury.

POINT IV

The Government failed to prove the two Counts of indictment Cr. 3875 C charging possession of an "obligation and security made and executed in part after the similitude of an obligation and security issued under the authority of the United States."

These Counts are charged under Title 18, U. S. C. A. Section 254, the pertinent language of which follows:

> "* * * or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; * * * shall be fined not more than $5,000, or imprisoned not more than 15 years, or both. (R. S. Sec. 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116.)"

The evidence submitted on the trial to prove the allegations in the indictment and to prove that a crime was committed in violation of the above quoted Statute, consisted

of three reverse impressions: the first, of the face of a $100 bill (Ex. G-17); the second, of the back of a $100 bill (Ex. G-18); and the third, of the back of a $10 bill (Ex. G-19). No other proof was adduced at the trial to show possession or custody of counterfeit obligations by the appellant.

It is respectfully submitted that these three reverse impressions are not obligations made or executed, in whole or in part, after the similitude of any obligation or other security issued by the United States, and that the Trial Court erred in submitting the question of the appellant's guilt on the second indictment to the jury because the evidence described was insufficient to sustain a verdict of guilty on the Counts.

The language of the Statute makes it clear that the words "in whole or in part" modify the words "made or executed." Specifically, in order for there to be a violation of this clause of the Statute, an individual must have in his possession a completely executed obligation which is after the similitude of an obligation of the United States, in whole or in part.

It should be noted at this point with particular emphasis that the language of the clause in question does not say "or any part thereof." If such words were placed at the end of the clause as they are placed at the end of the following clause relating to printing the likeness of an obligation of the U. S., the situation would be entirely different. In such a case, the printing of a likeness of the obligation constitutes the crime. The words "or any part thereof" modify the whole clause and thereby make the crime complete when any part of the obligation is printed.

In the possession and custody clause, however, as was stated above, the words "in whole or in part" modify the words "made or executed" in the sense that there must be a complete instrument, or at least one that purports to be

complete when viewed as a whole, and the crime of possession is established if merely some part or parts of that completed instrument are "after the similitude of any obligation or other security issued under the authority of the United States so as to deceive any unsuspecting person.

The words of the Statute do not make it a crime to possess an incompleted obligation, even if such part is exactly like the corresponding part of a true obligation of the United States. Indeed, the words "incompleted obligation," in the sense used, are a misnomer, since any instrument which purports to be an obligation must at least be complete to even have the label "counterfeit obligation" applied to it.

While the three impressions produced at the trial are actual reverse impressions of genuine United States obligations, that is, they would be exact prints if read through a mirror, each of them is printed only on one side of a paper larger than the actual size of United States currency. Therefore, if one were to hold one of these impressions in front of a mirror, he would see the similitude of one-half of a genuine bill. The Statute did not intend it to be a crime for an individual to possess such a paper.

The test of what constitutes the criminal act under the Custody and Possession clause of the Statute has been laid down by the courts time and again to be whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

U. S. v. *Weber*, 210 Fed. 973, at page 976:

> "It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine

obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest."

Minella et al. v. *United States, supra,* 44 F. (2d) 48, at page 49:

"Objection is made to the definition of 'similitude.' We think the charge was correct. It stated that the test was that the plate must be one 'from which it is possible to print, or which is capable of printing a $20 gold certificate in the similitude or likeness of a genuine $20 gold certificate of the United States, * * *' and that such similitude existed if 'it is calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care in his dealings with the ordinary citizen with whom he has transactions'. This is certainly sufficient under the statute if the statute is to have any practical meaning or effect. Any other construction would mean that, unless a counterfeit was perfect, it would not be in similitude. Of course, the government has taken all the steps which ingenuity and experience could suggest to make it impossible or difficult to exactly simulate its printed money. It is not to be expected that counterfeiters can do their work so perfectly as the government, nor are they required so to do to be punishable under these statutes."

It is patent that the evidence adduced at the trial falls so far short of passing this test that the Trial Judge should not have allowed its submission to the jury, and should have directed a verdict of acquittal on both counts of the second indictment. Since he did allow the jury to consider this evidence and since the jury did come in with a verdict of guilty on the Counts of the second indictment, the District Judge should have set aside such verdict as being against the weight of the evidence.

POINT V

The trial court erred in failing to instruct the jury on the law of the case.

Assuming, arguendo, that as to the three impressions in evidence (Exhibits G-17, G-18, G-19) it was a question for the jury to determine whether or not there was similitude, the Trial Court erred in not properly charging the jury as to the required test for similitude.

In a similar case, *United States* v. *Fitzgerald*, 91 Fed. 374, at pages 375, 376, the Court included in the oral charge to the jury the following instructions:

> "Now, the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction. The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute. Of course, the government claims no exclusive right to each and all of the details of its printing or engraving. As to the use of the words 'United States', or the green border, or any of the words singly or by themselves, the government does not claim an exclusive right to the use; but the paper is to be considered as an entirety, and if there is such imitation on the face of the paper, when you consider the kind of paper, the size, and the color, and the general style of it, that you can say that that paper is in the similitude of a security or obligation of the United States, and so well executed as to deceive an intelligent person in a business transaction, then it is sufficiently in the simili-

tude of a government obligation to warrant you in finding that fact against the defendant in this case; otherwise not. You are to consider the paper as an entirety."

No such instructions were contained in the Court's charge below. It is submitted that where the guilt of the defendants hinges on a definition of similitude as used in the statute, the jury should be instructed as to the substance of the crime and the test applicable thereto. A study of the District Court's charge to the jury fails to disclose any instruction on similitude.

In *United States* v. *Max,* 156 Fed. (2d) 13, the Court stated the rule on page 16:

"• • • a reversal is justified if the failure to instruct constitutes a basic and highly prejudicial error. *Williams* v. *United States,* 1942, 76 U. S. App. D. C. 299, 131 F. 2d 21."

• • • • • • •

"The court and counsel of both parties were thoroughly acquainted with the law which the defendant was accused of violating, but there is nothing in the record showing that the jury was ever informed as to such prime requisites."

• • • • • • •

"The correct procedure is carefully pointed out in our recent decision in *United States* v. *Noble,* 155 F. 2d 315, where we hold that it is necessary for the Court to charge orally the substance of the crime, first in order that the defendant may hear it and except thereto if he deems it advisable and second 'to make as certain as may be that each member of the jury has actually received the instructions.'"

In the instant case, it is submitted that the jury were not properly informed of the law and consequently the appellant was basically prejudiced.

POINT VI

The trial court erred in limiting the cross-examination of certain witnesses after they had given incompetent evidence substantially affecting the rights of the accused.

Captain Koerner testified on cross-examination that the equipment found in appellant's room could make counterfeit money. The Court allowed this testimony as proper when objected to by the U. S. Attorney (R. 30, 31). Yet, the Court sustained the U. S. Attorney's objection when counsel for appellant asked the following question:

> "Q. If anybody were to present you with one of these bills, would you consider them to be United States currency?
>
> Mr. Richman: I object.
>
> Mr. Auerbach: I am asking his opinion.
>
> The Court: Objection sustained. They are not charged with passing" (R. 31, 32).

This was to show that the witness went too far in his testimony that one could make counterfeit money with the equipment found in appellant's room. Having allowed the line of testimony to go in, the District Court should have allowed it to be properly followed up or should have directed that it be stricken out. It cannot be denied that it substantially damaged the appellant's case in the eyes of the jury.

The jury was allowed to hear testimony from a police officer which the Judge allowed, and it is only natural to presume that such testimony carried great weight. If

it was incompetent when the defense attempted to break it down, then it should have been stricken out entirely or a mistrial should have been declared.

Counsel attempted to prove that the cost of the materials found in the appellant's room was insignificant as compared to the cost of the usual counterfeiting plant. The Court refused to allow such proof to be admitted (R. 46). This proof would have been material on the question of whether or not these materials did constitute a counterfeiting plant in fact, and it was error for the Trial Court to exclude the testimony.

The witness Erickson testified as to how the impressions were supposedly made. He stated on *direct* examination how he thought they could be transferred from one paper to another (R. 47). Yet, when counsel requested his opinion on cross-examination as to whether the paper in evidence was a good impression, the Court sustained the objection that it was not proper cross-examination (R. 49). This opinion was material, in view of the previous testimony of the witness who was presented as an expert before the jury. His answer to the question would certainly have influenced the jurors as to the efficacy of the impression as a counterfeit, and the testimony may well have been in appellant's favor.

Agent Greene was allowed to testify on cross-examination that these impressions would deceive an honest, sensible, unsuspecting man of ordinary care and observation "in whole or in part" and proceeded to cite an example of how a split ten dollar bill was folded so that only the numerals showed and then was passed. The Court accepted this explanation as bearing on the "similitude" stating that this was "how people can be fooled into accepting money" (R. 65). The witness then admitted that he did not believe that an ordinary, reasonable

and prudent man would be taken in by it. He also stated that no one would accept the exhibit in evidence in its present state, adding that it was incomplete (R. 65). The Court then interposed the words "in whole or in part". The witness then said that if the exhibit *were trimmed down to the actual size of a bill you would then have something different,* implying that it would then be deceptive, but that as it stood, there was too much paper (R. 66). Counsel then asked whether the printing, or numerals being in reverse would make a difference, to which the witness, Greene, replied "No" (R. 66). Counsel was then refused permission to ask whether it would reasonably be accepted in a business transaction and this line of questioning was foreclosed (R. 66, 67).

It is urged that this was error, since the Court allowed the damaging testimony in and did not allow counsel an opportunity to have the witness further qualify his testimony under the test for similitude.

Thus it is clear that in the testimony of all of these witnesses, they were allowed to testify freely as to facts which were damaging to appellant, but were not permitted to answer questions which would have had the effect of neutralizing this prejudicial damage.

In the case of *Storm* v. *United States,* 94 U. S. 76, 85, 24 L. Ed. 42, 46, the Court states:

> "* * * it is equally certain that it is error to exclude a question, proper in form, which calls for evidence material to the issue. * * *"

See also

Lindsey v. *United States,* 133 Fed. (2d) 368.

POINT VII

Count 3 of Indictment Cr. 3829 C and Counts 1 and 2 of Indictment Cr. 3875 C are inconsistent.

In Count 3 of Indictment Cr. 3829 C the Government alleges that the three impressions (G-17, G-18, G-19) were materials from which counterfeit money could be made. Counts 1 and 2 of Indictment Cr. 3875 C refers to these same impressions as counterfeit money. They could not be both, they were either one or the other, and the Trial Court erred in submitting all of these Counts to the jury and then imposing consecutive sentences thereon.

CONCLUSION

The Judgment of Conviction Should Be Reversed.

Respectfully submitted,

EDWARD HALLE,
Attorney for Appellant.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER,
PETITIONER
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 102–107) is reported at 159 F. 2d 798.

JURISDICTION

The judgment of the circuit court of appeals was entered February 11, 1947 (R. 108), and a petition for rehearing was denied March 21, 1947 (R. 109). On April 19, 1947, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to and including May 19, 1947 (R. 109). The petition was filed May 19, 1947, and certiorari was denied on June 16, 1947. 331 U. S.

853. On July 5, 1947, and January 28, 1948, petitioner submitted to the Court letters concerning his case, and on February 16, 1948, an order was entered treating the letters as a petition for rehearing and granting rehearing. The order of June 16, 1947, denying certiorari was vacated and the petition for a writ of certiorari was granted (R. 110).

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the search of petitioner's hotel room and the seizure of the counterfeiting paraphernalia which was found was a federal enterprise.

2. Whether the evidence is sufficient to support the verdict on counts 1 and 2 of indictment No. 3829c, relating to the making of the counterfeit impressions of Federal Reserve Bank notes.

3. Whether possession of the counterfeit impressions, a wooden press and packages of bond paper is possession of "any plate, stone, or other thing" within the meaning of Section 150 of the Criminal Code, as charged in count 3 of indictment No. 3829c.

4. Whether the counterfeit impressions are "any obligation or other security made or executed, in whole or in part, after the similitude of

any obligation or other security issued under the authority of the United States," within the meaning of Section 150 of the Criminal Code.

5. Whether, having failed to request an instruction and having failed to object to the charge that was given, petitioner may now challenge the charge on the ground that it should have more specifically defined the statutory term "similitude."

6. Whether the trial judge erroneously limited the cross-examination of government witnesses.

7. Whether count 3 of indictment No. 3829c and the charges of indictment No. 3875c are inconsistent.

STATUTE INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> [1] Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; [2] or whoever by any way, art, or means shall

make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; [3] or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; [4] *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* [5] *or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same;* [6] *or whoever shall*

print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; [7] or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics supplied.]

STATEMENT

Two indictments (R. 2–5, 10–12), one in three counts and the other in two counts, were filed in the District Court for the District of New Jersey charging petitioner and one Reynolds with violations of Section 150 of the Criminal Code, *supra.*

Count 1 of indictment No. 3829c (R. 2–4) charged that, without the authority of any proper officer of the United States, they made a counterfeit impression of the face, and another of the back, of a $100 Federal Reserve Bank note; count 2 (R. 4) charged the counterfeiting of the back of a $10 Federal Reserve Bank note or silver certificate of the United States; count 3 (R. 4–5) charged that they possessed these counterfeit impressions and other described materials with intent to use them or suffer their use in forging and counterfeiting obligations of the United States. Count 1 of indictment No. 3875c (R. 10–11) charged that, without the authority of any proper officer of the United States, they possessed the face and back of an obligation made in part after the similitude of an obligation issued under the authority of the United States, to wit, a $100 Federal Reserve Bank note; count 2 (R. 11–12) similarly charged possession of the back of an obligation made in part after the similitude of a $10 Federal Reserve Bank note or silver certificate. The indictments were consolidated for trial (see R. 9), and both defendants were found guilty on all counts of both indictments after a trial by jury (R. 96–98). Petitioner was sentenced generally to five years' imprisonment on indictment No. 3829c, and generally to three years' imprisonment on indictment No. 3875c, the terms to run consecutively (R. 7, 12–13). On appeal by petitioner alone to the Circuit Court of Ap-

peals for the Third Circuit, the judgment of conviction was affirmed (R. 108).

The evidence particularly bearing on the issue of the search and seizure is set forth in detail, *infra*, pp. 10–13. The evidence in support of the charges of the indictments may be summarized as follows:

In December 1945, petitioner was released after having served a sentence to imprisonment for 18 months (R. 88). Thereafter he was arrested for the offense of grand larceny and was enlarged on bail (R. 88–89). On March 6, 1946, while still enlarged on bail, petitioner and the defendant Reynolds checked into the Walt Whitman Hotel in Camden, New Jersey. Petitioner registered as Dr. Edward E. Fischer (R. 33–34) because he was trying to be "careful" (see R. 85) since "my business wasn't absolutely legal" (R. 86). He registered Reynolds as "Joe Binstock" (R. 33–34), because Reynolds had told him that "I am known here as a race horse man, a card player, and they might get me on that" (R. 85). The defendants were assigned to room 402 (R. 34).

Around noon on March 10, 1946, a chambermaid of the Walt Whitman Hotel, while working in Room 404 of the hotel, heard noises "like glass hitting against glass or metal hitting against metal" coming from the defendants' adjacent room, No. 402 (R. 52). While in Room 404, she looked into

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Room 402 through a keyhole of a door which connected the two rooms and observed petitioner holding a piece of wet paper; he "took [the paper] apart" and gave a piece to Reynolds; it was "of greenish color like money." Both men looked at the paper through a magnifying glass. She also saw petitioner place several small bottles and a small paint brush on a desk. She heard one of the men say, "That is enough of them, that is enough of them." (R. 52–53.)

At approximately 4:00 p. m. the same day, members of the Camden City detective bureau conducted a search of Room 402 in the absence of its occupants (R. 14). They found in two brief cases various articles of counterfeiting equipment, including pliers, bond paper, paper cut to the size of United States currency, a number of small bottles containing liquids, brushes, tweezers, what appeared to be castors wrapped in cloth, a piece of sponge, pieces of wet paper, a magnifying glass, a piece of plate glass, a wooden cylinder wrapped in cloth, etc. (R. 15–17). Also found in the brief cases were three impressions on paper, one of the face of a $100 Federal Reserve Bank note, another of the back of such a note and the third of the back of a $10 bill (R. 17–18). These impressions were, apparently, all in reverse (see R. 64). They had evidently been produced by partially transferring the print on genuine currency to blank paper by the use of phenol (see

R. 47–50), a quantity of which was among the items found in the hotel room (R. 43–45).

Petitioner and Reynolds were placed under arrest on their return to the hotel at approximately 6:30 p. m. (R. 19, 61). Petitioner admitted ownership of both brief cases and their contents (R. 19, 27, 33). He denied, however, that the impressions of Federal Reserve notes found in the brief case were his (R. 39). He told the officers that "they were not here to pass counterfeit money. They were here to sell the idea how to make it; make an easy living" (R. 20, 30). He admitted that the articles seized "were the items with which he was going to make counterfeit money" (R. 30).

Norwood Greene, an agent of the United States Secret Service since 1933 (R. 60) and an expert in counterfeiting matters (R. 63), testified that the three impressions were reasonable facsimiles of the bills which they were intended to imitate (R. 63), and that their likeness to United States currency was such as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation (R. 64).

Petitioner was the sole defense witness. He testified that he came to Camden to demonstrate a "money machine" to one Weber (R. 79). At petitioner's direction Weber assembled various of the implements necessary in the process (R. 79–80, 84) and pursuant to petitioner's directions Weber made the impressions which were later

found in the room (R. 85, 89). Petitioner was paid $500 and $150 for expenses for assisting Weber in this manner (R. 81). "Weber" was a pseudonym which petitioner previously had used (see R. 86–87).

The evidence bearing on the legality of the search and seizure may be summarized as follows:

When the chambermaid at the hotel became suspicious of petitioner's activities, the information was conveyed to the local police and to Secret Service Agent Greene. Greene went to the hotel at about 2 p. m. on March 10, 1946. He did not enter petitioner's room; instead he went to Room 404, the adjoining room, and looked through the same keyhole the chambermaid had used (R. 60). During the fifteen minutes in which he did this Greene observed petitioner walking about in Room 402, and also saw what appeared to be a magnifying glass on the desk, but saw no evidence of counterfeiting (R. 68–69). He talked briefly to the chambermaid, who told him that she had seen petitioner handling something that looked like money (R. 68). Greene then proceeded to detective headquarters and informed Detective Arthur, who had originally summoned him (R. 67), that he had seen no evidence of counterfeiting (R. 69, 70). At this point Greene was satisfied in his own mind that "there was no counterfeiting going on" (R. 69–70). He testified that his official interest in the matter ended then (R. 70).

Detective Arthur summoned his superior officer, Captain Koerner, and Greene told him that he "had not seen anything, but his information led him to believe there was something going on in that room" (R. 21).[1] He gave Koerner the names of the occupants of Room 402 as "Doctor Fischer and Binstock," the aliases used by the defendants in registering at the hotel (R. 21). Koerner checked with police sergeant Murphy as to whether he recognized the name of Binstock "as being a race horse man or a tout or a bookie, or something like that" and Murphy stated that he did (R. 21, 36).

Koerner went to the hotel and verified the names of the occupants of Room 402 and then returned to his office (R. 21–22). Sergeant Murphy testified that he discussed the matter with Koerner in his private office. Greene remained in an outer office and did not participate. (R. 42–43.) Koerner told Murphy of the information they had received concerning the defendants' activities, and Murphy rejected the theory that the defendants were counterfeiting currency in a public hotel. He thought it more likely that "they might be trying to counterfeit rack-track tickets." (R. 43.) Murphy suggested to Koerner that they

[1] Detective Arthur and the manager of the hotel had initially telephoned Greene and informed him that they suspected counterfeiting activities in Room 402 (R. 60, 67, 68). Apparently it was this unconfirmed information which led Greene to tell Koerner he thought there was something going on in the room.

"get into that room [Room 402] and find out what was in there" (R. 43). Accordingly, Koerner procured a warrant for the arrest of the defendants for violation of a Camden ordinance requiring all criminals staying in the city longer than twenty-four hours to register with the city authorities (R. 14, 22).[2]

To this point, Greene's sole participation in the events that occurred at police headquarters was to withdraw himself from the case and to furnish the defendants' names to the local police, and this information was verified by Koerner (R. 23). Greene did not ask the police to obtain the arrest warrant (R. 23) and he did not "discuss with Captain Koerner anything about making an entrance or going into room 402 to see whether anything would be found there" (R. 72). When at approximately 4:00 p. m. Captain Koerner, Sergeant Murphy and two detectives left police headquarters to execute the arrest warrant, Greene remained at police headquarters because "I was curious to see what they would find" (R. 72).

The four police officers proceeded to the hotel, obtained the key to Room 402 from the desk clerk and then proceeded to enter the room (R. 23). Neither defendant was in the room (R. 23). The police searched the room and uncovered the counterfeiting paraphernalia (R. 14–18, 24). After

[2] Koerner knew "Binstock" as a "confidence man," but he knew nothing about "Fischer" [petitioner] (R. 22).

the search had been completed, at about 5:00 p. m., Sergeant Murphy told Koerner that they had evidence of a federal crime and he then called Greene and told him what they had found (R. 24, 41, 74). Greene came to the hotel after the search had been completed (R. 25), and the police turned over to him that evidence which related to the federal offenses for which the defendants were convicted (R. 20, 62). The defendants returned to their hotel room at approximately 6:30 p. m., and they were immediately arrested by the local police (R. 19, 61), and they were later convicted for the local offense (see R. 28).[3] On the following day a federal complaint was issued against the defendants (R. 71).

A pre-trial motion to suppress the seized evidence was denied after a hearing (see R. 1, 76), but the transcript of the proceedings is not included in the record before this Court. At the trial, the evidence was admitted without objection (R. 75–76), but the trial judge considered on its merits a subsequent motion by petitioners' counsel to suppress the evidence (R. 76). In denying the motion, the trial judge stated (R. 76):

> * * * But I think it has been established that there was a basis for the city authorities to obtain their warrant of ar-

[3] The records of the clerk of the Camden, New Jersey, Police Court disclose that on March 12, 1946, both defendants pleaded guilty to the offense of failing to register with the city authorities, and each was sentenced to imprisonment for 30 days.

> rest, and then, in the event there was no connection between the Federal authorities and the city authorities to the extent of an arrangement whereby the city authorities would go in and make an illegal raid, it seems to me the warrant being proper for the violation of the local law, they went in to make an apprehension under an arrest warrant, and they can make their search incident to that arrest. Even under the Federal law, I think that would be a proper search and seizure. Even if that were not so, I do not see any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law. * * *

The circuit court of appeals agreed with the action of the trial judge because (R. 104–105):

> From the facts we think it a reasonable conclusion that the search of appellant's room was in truth a proceeding by the state rather than an undertaking of Federal Agent Greene to obtain evidence in a manner forbidden by the federal law while at the same time avoiding the consequences by cooperation with the Camden police. There is no evidence of prearrangement or understanding between Greene and Captain Koerner in the obtaining by the latter of the city warrant and his subsequent search of appellant's room. Greene had frankly advised Koerner that he had found no evidence of counterfeiting. From then on the Camden police executive acted on his

own initiative. It is true that Greene took advantage of the results, but, as we see it, in legitimate fashion and within the bounds of the cases covering the subject. * * *

SUMMARY OF ARGUMENT

I

The search of petitioner's hotel room and the seizure of the counterfeiting paraphernalia which was uncovered was by the local police while executing a warrant of arrest and in the course of an investigation of possible violations of state law in connection with the counterfeiting of race track tickets. The search was not instigated by any official of the federal Government, and it was not made in connection with the enforcement of federal law.

The facts set forth in the Statement demonstrate that the preliminary investigation which federal secret service agent Greene made ended early in the afternoon when Greene concluded that there was no evidence of the counterfeiting of currency. Thereafter the local police came into the case. The uncontroverted evidence is to the effect that Greene did not participate in the subsequent plans or acts of the local police. He had no connection with their obtaining a warrant for the arrest of the defendants for a local offense; he did not suggest to the local police that they search petitioner's room and, indeed, he was not even present when the local police determined to enter

petitioner's room to see if he was counterfeiting race track tickets; and he did not participate in the search or seizure. The case is not like *Byars* v. *United States,* 273 U. S. 28, where a federal official participated as such in a state undertaking, nor is it like *Gambino* v. *United States,* 275 U. S. 310, where the state officials acted solely in the enforcement of federal law.

When the local police summoned Greene after they had found the paraphernalia for counterfeiting currency, the search had been completed and the materials had been seized by them. It was they who turned them over to Greene, and since they were strangers to the federal Government, petitioner's rights under the Fourth Amendment were not impaired. *Byars* v. *United States, supra,* at p. 33; *Weeks* v. *United States,* 232 U. S. 383, 398.

II

1. There is ample evidence in support of the verdict on counts 1 and 2 of indictment No. 3829c, charging petitioner with making impressions of the Federal Reserve notes. The equipment for making the impressions was found in petitioner's room. The impressions were found in petitioner's brief case among his belongings. The chambermaid observed conduct and overheard talk which suggest that the impressions were made in the morning of the day on which petitioner was arrested. And, finally, on his arrest petitioner admitted that, "We are here to make counterfeit

money but we are not here to sell it" (R. 30). When petitioner took the stand in his own defense, he admitted that the impressions were made pursuant to his instructions and denied only that his purpose was to pass counterfeit money.

2. There is no occasion to determine whether count 3 of indictment No. 3829c charges an offense, for the general sentence imposed upon petitioner is supported by either of the first two counts of the indictment.

3. There is ample evidence to support the verdict of the jury in respect of indictment No. 3875c, charging petitioner with possession of "an obligation * * * made * * * in part after the similitude of an obligation * * * issued under the authority of the United States." Petitioner's contention that none of the impressions was a complete obligation is answered by the fact that one of the impressions, Exhibit G–17 (R. 18, 76), consisting of the face of a $100 Federal Reserve note, contained the essence of an obligation, and purported to be one. It was a promise to pay, with the usual accompanying signatures. The reverse side of the impression was blank, unlike a valid note, but the back side of a note is no essential part of the obligation or promise to pay which it evidences. The document in petitioner's possession purported to be an obligation of the United States and the evidence demonstrates that it so closely resembled a genuine obligation as to deceive an unsuspecting person.

In any event petitioner has no standing to raise the point since he did not assert it in the trial court and it was not assigned in his "Grounds of Appeal."

4. Petitioner has no standing to complain that the trial judge did not specifically instruct the jury as to the meaning of "similitude." Petitioner did not request any such instruction; he did not challenge the sufficiency of the instructions in the trial court; and he did not assign the matter in his "Grounds of Appeal." In these circumstances, Rule 30, F. R. Crim. P. forecloses the contention.

5. As we show in the Argument, *infra*, pp. 43–45, in each of the instances in which petitioner complains that the trial judge improperly limited his cross-examination of certain government witnesses, there was ample basis for the action of the court either because the question was not material or because it was not properly a matter to be raised initially on cross-examination.

6. There is no inconsistency in treating the counterfeit impressions as devices for counterfeiting, as charged in count 3 of indictment 3829c, and as counterfeit obligations, as charged in the second indictment. The impressions were usable in either way. New impressions could have been made from the impressions that were seized and they also could have been distributed in the channels of commerce under the pretense that they were genuine obligations. In any event, there is

no necessity for relying on count 3 to sustain the judgment, and if this count is abandoned, there is no basis for the inconsistency contention.

ARGUMENT

I

The uncontroverted facts establish that the search and seizure was by State officers on behalf of the State and was neither instigated by the Federal official nor for the enforcement of Federal law

In a large measure petitioner's conviction was founded on evidence obtained from his hotel room as a result of the search and seizure in which the local police engaged. Petitioner's basic contention in this Court is that the search and seizure was made "solely for the purpose of aiding the federal authorities" (Br. 12) or, at the very least, that it was a "joint venture of the Federal and Municipal enforcement agencies" (Br. 9), and therefore, that the evidence should have been suppressed.[4]

There is no disagreement among the parties as

[4] Quite plainly, the search was an illegal one if tested by the Fourth Amendment, for it was not made in pursuance of a search warrant, and since it preceded the arrests, it probably cannot be said to have been made incident to the arrests. Thus, if it is determined that the search is attributable to the Federal Government, petitioner was entitled to have his motion to suppress granted. There is no occasion to inquire whether the search was good under state law, for if it was a Federal undertaking, the Federal test must be applied. If it was not a Federal undertaking, its legality under State law is immaterial. See *Byars* v. *United States*, 273 U. S. 28, 29.

to the applicable principles of law. Indeed, there could not be for the principles are plainly and firmly imbedded in our law. Thus, the Fourth Amendment protects the citizen against unreasonable searches and seizures by the Federal Government, but it is not a restraint on the enforcement agencies of the states. *Feldman* v. *United States,* 322 U. S. 487, 490; *National Safe Deposit Co.* v. *Illinois,* 232 U. S. 58, 71; *Weeks* v. *United States,* 232 U. S. 383, 398. Accordingly, where state officers or other strangers to the Federal Government improperly seize evidence, the right of the Federal Government to avail itself of that evidence is unquestioned. *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Weeks* v. *United States, supra; Byars* v. *United States,* 273 U. S. 28, 33; see *McGuire* v. *United States,* 273 U. S. 95, 99.

This principle is subject only to the limitation that the Federal Government may not do indirectly what it cannot do directly. See *Anderson* v. *United States,* 318 U. S. 350, 356. Thus, participation by a federal official acting as such in an unlawful search under the auspices of state police renders it a joint operation of the federal and state governments and the protection of the Fourth Amendment comes into play. *Byars* v. *United States,* 273 U. S. 28. Similarly, where state officers make an illegal search and seizure for the sole purpose of aiding a federal prosecution, the evidence is inadmissible in the federal courts *Gambino* v. *United States,* 275 U. S. 310.

The test in each case is whether in a realistic sense the illegal search and seizure was a federal enterprise, and in applying the test the importance of the constitutional rights involved forbids the drawing of "nice distinctions" as to when the wrongful act of the state officials was also a federal venture. See *Feldman* v. *United States,* 322 U. S. 487, 492. This Court has held that the Government may retain and use as evidence papers which were unlawfully seized by a private person (*Burdeau* v. *McDowell,* 256 U. S. 465), and similarly that where it does not appear that the local police in searching and seizing acted under any claim of federal authority, the evidence so seized is admissible in a federal trial (*Weeks* v. *United States,* 232 U. S. 383, 398).

Since we start with these accepted principles concerning which the parties are not in disagreement, the only question which remains is whether the facts support petitioner's contention that the search and seizure by the local police was really a federal enterprise. In approaching the question, it is to be noted that the evidence in question was admissible, unless petitioner satisfied his burden in the trial court of proving that the local police acted for or in cooperation with the federal agent. *Nardone* v. *United States,* 308 U. S. 338–341; *Rettich* v. *United States,* 84 F. 2d 118, 122 (C. C. A. 1). As we have shown in the Statement, *supra,* pp. 13–14, the trial judge was not persuaded by the evidence that there was "any connivance or ar-

rangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law" (R. 76), and the circuit court of appeals agreed with this view of the facts (R. 104–105). Two courts have determined that petitioner failed to sustain his burden of proof.

In the view we take of the evidence, it is not possible to disagree with those findings unless the uncontroverted, positive testimony of the local police and the federal agent is disbelieved. The trial judge as trier of the facts obviously resolved the issue of credibility in favor of the witnesses. The circuit court of appeals, it may be assumed, accepted the trial judge's judgment on the issue of credibility. This Court is not free to do otherwise. As we shall show, the testimony in question is not inherently improbable, inconsistent or lacking the hallmark of truthfulness. This Court has none of the accepted bases for resolving questions of credibility. And it is for this reason that, "It is not for [this Court] to weigh the evidence or to determine the credibility of witnesses. The verdict of [the trier of fact] must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U. S. 60, 80. See also, *Lisenba* v. *California,* 314 U. S. 219, 238; Mr. Justice Burton dissenting, *Haley* v. *Ohio,* 332 U. S. 596, 615–625. Accepting the uncon-

troverted testimony of the local police and secret service agent Greene, the case comes to this:

Acting on information conveyed to him by a local detective (R. 67), and confirmed by the manager of the hotel (R. 67–68), secret service agent Greene undertook a preliminary investigation to determine whether the defendants were engaged in counterfeiting currency. Undoubtedly with the consent, but at least with the acquiescence of the hotel management, Greene entered room 404, the room adjoining the defendants', and, like the chambermaid, he looked through the keyhole of the connecting door in an effort to see what was happening in room 402. He saw no evidence that a federal offense was being committed, and he proceeded to the local detective bureau, the source of his original information, to apprise the local police that his official interest in the matter was at an end (R. 70). Greene testified that he told detective Arthur "that I had not seen any evidence of counterfeiting" and that at that time "From an evidential standpoint, I was satisfied there was no counterfeiting" (R. 69, 70). He furnished the local police with the names of the defendants, but did not further participate in what followed at detective headquarters.

The detectives recognized the name "Binstock," used by defendant Reynolds, as the name of a "race horse man or a tout or a bookie, or something like that" (R. 21). Sergeant Murphy, a

local policeman, rejected the theory that the defendants would counterfeit currency in a hotel room, and he theorized instead that "they might be trying to counterfeit race-track tickets" (R. 43). It was Murphy who suggested to Captain Koerner that they get into the defendants' room and find out what was in it (R. 43). Greene was not in Koerner's office and did not participate in this discussion (R. 42–43).

Evidently in pursuance of Murphy's plan, the local police obtained a local warrant of arrest for violation of a local ordinance and proceeded to defendants' hotel room. Greene did not accompany them. Without attempting to effectuate an arrest at that point, the local police entered the room with a key, searched the room for less than one hour and seized the materials which they found.

It was at this juncture that Sergeant Murphy concluded that there was evidence of a federal offense, in addition to the local crime for which the defendants were arrested, and he summoned Greene. When Greene entered the hotel room the police had the seized items set out on the bed and Captain Koerner later turned over to Greene the evidence which was used against petitioner in his federal criminal trial. When the defendants returned to their room, the local police immediately arrested them for the local offense. It was not until the next day that the initial steps to a federal prosecution were taken.

In evaluating Greene's place in the factual picture, the positive testimony of Captain Koerner is that Greene did not ask him to obtain the warrant; that Greene did not go to the hotel with him; and that "the only information received from Agent Greene was as to the names. I verified that by going to the hotel myself" (R. 23). Sergeant Murphy similarly testified that his discussion of the case with Captain Koerner—when the theory that the defendants might be counterfeiting race-track tickets and the plan for the search were developed—took place in Koerner's private office while Greene "was out in the large office talking to another man that was there"; that Greene did not participate in his conversation with Koerner; that he did not talk to Greene "about what might be found at the hotel"; that Greene did not accompany them on the search; and that Greene came to the hotel room after the search was completed in response to his telephone call (R. 41–43). In addition to his testimony that his interest in the case as a federal agent ended after his brief preliminary investigation at the hotel (*supra*, p. 10), Greene testified on cross-examination in part as follows (R. 72–73):

> Q. Mr. Greene, I suggest that * * * when you returned to the detective bureau, after your vigil at the keyhole, you discussed with Captain Koerner the possibility of making a raid or making an entrance into this room to see whether or not any-

thing might be discovered that would concern itself with counterfeiting. Is that so?

A. That is not so.

Q. You never had any discussion with him?

A. I made no suggestions.

Q. Did you have any discussion with him regarding the possibility I mentioned?

A. I mentioned the names of Doctor Edward E. Fischer and Joseph Binstock. As soon as I said Binstock that name seemed familiar, and he reached over and grabbed the telephone and called Detective Sergeant Tom Murphy.

Q. You don't know whether he had been called by any city police prior to that?

A. No; I don't.

Q. You didn't discuss with Captain Koerner anything about making an entrance or going into room 402 to see whether anything would be found there?

A. No, sir.

Q. You weren't interested officially?

A. Officially, I wasn't interested.

Q. But, nevertheless, you remained at detective headquarters from half past two to five o'clock, unofficially?

A. I was curious to see what they would find.

Q. You had no indication as to what they would find?

Mr. RICHMAN. If your Honor please, I object. That is immaterial.

The COURT. Objection overruled. Go ahead.

A. Captain Koerner thought they might be making a race track ticket.

On these facts, we think it plain that Greene did not either directly or indirectly partake in the search and seizure of which petitioner complains. Petitioner properly does not suggest that Greene directly did so. For Greene's only investigative activity was to peer through the keyhole from room 404, the room which adjoined petitioner's. It is at least a fair inference that having been summoned to the hotel by its manager, Greene was not a trespasser while he was in that room. He was there as of right. When he looked through the keyhole, Greene, of course, did not make a search in the constitutional sense. The words "search and seizure," this Court has said, could not extend "to forbid hearing or sight." *Olmstead* v. *United States,* 277 U. S. 438, 465. Looking through the keyhole was no more a search than looking through a window, as in *Agnello* v. *United States,* 269 U. S. 20, 28–30, or using a search light to observe on a boat what the darkness of night concealed (*United States* v. *Lee,* 274 U. S. 559, 563).[5] Greene's only other con-

[5] In the lower Federal courts there are cases where the police have obtained knowledge of the commission of a crime by looking through windows (*Carvalho* v. *United States*, 54 F. 2d 232 (C. C. A. 1); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579); through a crack in a door (*Gracie* v. *United States*, 15 F. 2d 644 (C. C. A. 1)); and through a transom (*Mulrooney* v. *United States*, 46 F. 2d 995 (C. C. A. 4)).

tact with petitioner's room occurred after the local police had completed their search of the room and had taken custody of the materials which they found. Captain Koerner turned over to Greene the instrumentalities of the federal crime. Hence, it cannot be said that Greene seized anything from petitioner's room; the seizure was by the local police. If they acted on their own account, the federal Government was entitled to avail itself of evidence seized by them. *Byars* v. *United States,* 273 U. S. 28, 33.

That the local police made the search and seizure in investigating a suspected local offense and not in cooperation with federal agent Greene or solely in aid of a federal prosecution is demonstrated by contrasting the facts of this case with the facts in the *Byars* case, *supra,* and *Gambino* v. *United States,* 275 U. S. 310, the decisions which are the foundation for petitioner's contention in this Court.

In the *Byars* case a search was conducted on the basis of a state search warrant which was invalid under federal law. Four local officers and a federal officer made the search, which disclosed evidence of a federal crime. The federal officer participated in his official capacity as an enforcement officer. In these circumstances, this Court was unable to avoid "the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the

local and federal officers," and thus was a federal enterprise (273 U. S. at 33). The opinion makes plain the fact that if the federal officer had not been a party to the search or had participated "as a private person" (273 U. S. at 32) the Federal Government would have been entitled to avail itself of the fruits of the search (273 U. S. at 33). In the present case, it is undisputed that federal agent Greene did not participate in the search or seizure, nor did he instigate it or cooperate in any way with the local officers who made the search.* If he had been contacted for the first time after the search and seizure had been completed, there could be little question that it was not a federal venture. The fact that federal agent Greene conducted a preliminary investigation and then officially ended his interest in the matter even before the local police formulated their plans does not make the search any more an undertaking of the Federal Government.

In *Gambino* v. *United States, supra,* state police, not acting under federal direction, engaged in a wrongful arrest, search and seizure "solely on behalf of the United States" (275 U. S. at 316), they having assumed that it was their responsibility to cooperate in federal law enforcement (275 U. S. at 314–315). Pointing out that there "is no suggestion that the defendants were committing, at

* The testimony of Captain Koerner, Sergeant Murphy, and Greetne (see *supra*, pp. 25–27) demonstrate that Greene did not participate in or instigate the plans of the local police.

the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had" (275 U. S. at 314), this Court held that the state officers acted "solely for the purpose of aiding in the federal prosecution" (275 U. S. at 315), and that the evidence should have been excluded. The Court carefully distinguished earlier decisions, in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecution for federal crimes, on the ground that "in none of those cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S. at 317). The constant point of emphasis for Mr. Justice Brandeis, in speaking for the Court, was the fact that in *Gambino's* case the search and seizure had been made solely for the purpose of aiding in the enforcement of the federal law (275 U. S. at 317–318).

No such all-persuasive factor exists in this case. Here, the local police had a local warrant of arrest for the violation of a local ordinance requiring criminals to register with the local public authorities. Petitioner and his codefendant were arrested for this offense, they pleaded guilty, and they were sentenced to imprisonment for 30 days (see *supra*, p. 13). The search and seizure was a part of this transaction. For the police went to the hotel to execute the warrant of arrest, and

while there, they engaged in the search and seizure. The search was made for the purpose of ascertaining whether, as Sergeant Murphy theorized, the defendants were engaged in counterfeiting race track tickets. Horse racing is a carefully regulated activity in New Jersey. See New Jersey Statutes Annotated, Secs. 5:5–22 to 5:5–78. And provision is made for a pari-mutuel system of wagering on such races. Sec. 5:5–62. It was the theory of the local police that the defendants might be counterfeiting the tickets used in the pari-mutuel system. This, of course, would have been a violation of state law. If the facts which the local police discovered had sustained their theory, petitioner, we believe, could have been prosecuted for violation of Section 2:132–1, New Jersey Statutes Annotated, which provides, in part:

> Any person who, with intent to prejudice, injure, damage or defraud any other person shall:
>
> a. Falsely make, alter, forge or counterfeit, or cause, counsel, hire, command or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging or counterfeiting.
>
> * * * * *
>
> 5. Any warrant, order or request for the payment of money, o rdelivery of goods or chattels of any kind, or

6. Any acquittance or receipt, either for money or goods, or [7]

* * * * *

With counterfeit tickets petitioner would have been in a position to obtain payment on purported wagers and thus to defraud the operator of the wagering system. If, instead, the evidence had disclosed a private system of wagering on the races, petitioner could have been prosecuted by the state for possessing lottery paraphernalia, in violation of Section 2: 147–3, New Jersey Statutes Annotated. Without laboring the point, it cannot be denied that there was ample basis for local police to be investigating a possible state offense. Certainly, it cannot be said on the facts of this case, as this Court said in the *Gambino* case, that "the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S. at 317).

In sum, the record convincingly demonstrates that the activities of the local police related to local law enforcement. They did not act for the Federal Government or at the instigation of one of its officials. In these circumstances, to attribute the search and seizure to the Federal Government is unjustifiably to attribute a disregard for the Fourth Amendment to an enforcement officer who

[7] The counterfeit ticket is a "request for the payment of money" when it is presented at the conclusion of the race for payment of the wager. It likewise purports to be a receipt for money wagered.

scrupulously avoided treading on petitioner's rights and to grant a bounty to petitioner who by his criminal activities has revealed himself to be at constant war with society (see R. 86–89).

II

There is no merit in any of petitioner's remaining contentions

1. *The sufficiency of the evidence as to counts 1 and 2 of indictment No. 3829c.*—Count 1 of indictment No. 3829c charged that petitioner made, caused to be made and aided in making an impression of the face and back of a $100 Federal Reserve Bank note, and count 2 similarly charged the making of an impression of the back of a $10 Federal Reserve Bank note (R. 2–4). Petitioner urges that the evidence is insufficient to support the conviction on these counts; and that the jury should have been instructed to return a verdict of not guilty. We firmly agree with the court below that the evidence established by the Government furnished ample basis for the verdict.

As we have shown in the Statement, when the police searched petitioner's room they found the impressions in question in petitioner's brief case. Petitioner admitted that all the other contents of the brief case were his, but denied that he had ever seen the impressions. Upon his arrest petitioner stated to Captain Koerner, "We are here to make counterfeit money but we are not here to sell it. We are here to show them how to make

an easy living" (R. 30. See also, R. 38). He told Secret Service Agent Greene, "I am not making counterfeit money. I am only showing people how to make it." (R. 74, 62).

An ink expert testified that with phenol, which was among the items found in the room, an impression could be transferred from one paper to another almost "like a decalcomania" (R. 47; see also, R. 31). It was in this setting that evidence was adduced showing that in addition to the impressions in his room petitioner had in his possession the implements of counterfeiting by the transfer method: pliers, bond paper cut to the size of United States currency, small bottles containing various liquids including phenol, brushes, tweezers, sponge, pieces of wet paper, a magnifying glass, a piece of plate glass, a wooden press, etc. (R. 15–17). That these items were not curios, but rather implements for petitioner's illicit activities is shown by the testimony of the chambermaid that while in the adjoining room she heard a noise like glass hitting against glass or metal hitting against metal. She looked through the keyhole of the door and saw petitioner holding a piece of wet green paper, which he tore, giving a piece to the defendant Reynolds. She testified the paper looked like money to her. Then petitioner got out a little glass bottle—the kind that was later shown to contain phenol—and an artist's paint brush and laid them down. She then saw

a magnifying glass, which both defendants looked through. And she heard one of the men say, "That is enough of them, that is enough of them." (R. 52–53.)

Petitioner's argument makes no effort to explain away these crucial facts. Instead, he urges that the Federal Reserve notes from which the transfers were made were not found, and that if the impressions were made when the chambermaid was watching they still would have been wet when they were seized. It is true that the Government's case would have been even stronger if the money used in making the transfers had been found, but a strong case is no less so because it might have been even stronger if additional evidence had been found. There may have been sufficient time for the counterfeit impressions to have dried during the period from when the chambermaid looked in the keyhole until the undisclosed time when petitioner left his hotel room. But this factor, too, furnishes no troubling doubt. The fact is that the implements for transferring impressions were found in petitioner's room and transferred impressions were found among his possessions in his brief case. Coupled with the information disclosed by the chambermaid's testimony, it is less than difficult to conclude that the impressions which petitioner possessed were made by him or at his direction. Petitioner's admission upon his arrest (*supra*, pp. 33–34) that he was

there to make counterfeit money but not to sell it confirms what is otherwise fairly to be inferred from the evidence—that he had a direct connection with the making of the impressions. The trial judge properly denied the motion for a directed verdict (R. 77).

It is not without significance that when petitioner took the stand in his own defense, he did not deny that impressions had been transferred. Indeed, he testified that pursuant to his instructions, one Weber made the impressions (R. 84–85). Petitioner's sole defense was that the entire process had relation only to a "device [that] is strictly a swindle" (R. 80), and that the impressions were not made for counterfeiting purposes. Thus, by petitioner's own testimony, his connection with the making of the impressions is established. His purpose in making them was, of course, for the jury.

2. *The validity of count 3 of indictment No. 3829c.*—Count 3 of indictment No. 3829c charges that the defendants had in their possession, with intent to use for counterfeiting, the impressions which are the subject matter of the first two counts, a wooden press, and packages of bond paper. Petitioner urges that possession of these materials is not made an offense by Section 150 of the Criminal Code (18 U. S. C. 264), which provides in relevant part:

> * * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made

> after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof * * *.

The court below, reading "other thing" broadly, construed the clause as reaching possession of the reverse impressions which could be used to transfer to another piece of paper the impression as it originally appeared on the genuine note (R. 106). We agree with the circuit court of appeals that Section 150 should be construed consistently with the intent of Congress to strike at all devices by which counterfeit currency may be made. But there is no occasion here to contend for that construction, for the question need not be reached. Petitioner was sentenced generally to imprisonment for five years on indictment No. 3829c (R. 7). Thus, the judgment is supported by either of the other counts of the indictment. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105.

3. *The sufficiency of the evidence to support the charges of indictment No. 3875c.*—Petitioner also contends (Br. 25–28) that the evidence is insufficient to sustain the verdict in respect of the two counts of indictment No. 3875c, each charging possession of "an obligation * * * made

* * * in part after the similitude of an obligation * * * issued under the authority of the United States" (R. 10–12). He argues that counterfeit obligations, possession of which is forbidden, must be completely executed, whereas here the evidence shows that the counterfeit obligations were incomplete, consisting only of the impressions, in reverse, of single sides of genuine obligations. He urges that the trial judge should, therefore, have directed a verdict of acquittal on both counts of this indictment, or at least that he should have set the verdict aside on the ground of its being against the weight of the evidence (Br. 28).

Petitioner did not, however, at any stage of the trial proceedings, challenge the sufficiency of the evidence as to these counts on this ground. His motion for a judgment of acquittal at the close of the Government's case was based solely on the ground that the evidence was insufficient to show possession in him (R. 77), and even this was not renewed at the end of the whole case (R. 90). Moreover, he made no motion of any kind, after verdict, in the nature of a motion for judgment of acquittal notwithstanding the verdict (R. 96–98). On the contrary, his counsel affirmatively replied, "No requests," when asked if there were any requests following rendition of the verdicts (R. 98). Indeed, the alleged insufficiency of the evidence now asserted was not even made one of

the "Grounds of Appeal" (R. 8).[8] Under well-settled principles, therefore, petitioner had no standing in the court below, nor has he standing here to question for the first time the sufficiency of the evidence in respect of whether the obligations allegedly possessed were within the purview of the pertinent language of 18 U. S. C. 264, *supra*, on which these counts were based.

But since the circuit court of appeals considered the contention on its merits (R. 106–107), we shall do so also. With the circuit court of appeals, we think it without merit. One of the three impressions on which the two counts of indictment No. ~~4875ev~~ 3875c were based was a completely executed counterfeited obligation of the United States.[9] This was Exhibit G–17 (R. 18, 76), con-

[8] Moreover, as pointed out by the court below (R. 107), the three impressions were received in evidence without objection by petitioner in respect of this phase of the matter (R. 18, 75–76), and there was no request to charge in connection with the issue now under consideration.

[9] Since petitioner's general sentence of three years' imprisonment on this indictment (R. 12–13) was less than the 15-year maximum imposable under either of its counts, it is sufficient, in order to sustain the judgment of conviction under this indictment, to show that any one of the three impressions in question was a counterfeited obligation of the United States of the type proscribed. *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, note 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105. However, we think the statute is capable of being construed to include even the counterfeit back of a Federal Reserve note which is in part in similitude of a valid note and which is intended to be passed as a genuine obligation. Cf. *United States* v. *Raynor*, 302 U. S. 540, 546–552.

sisting of the impression of the face of a $100 Federal Reserve note (see R. 11). It contained the essence of the Government's obligation ("The United States of America will pay to the bearer on demand One Hundred Dollars," coupled with the counterfeited signatures of the Treasurer of the United States and the Secretary of the Treasury), as well as as the other customary notations and figures which appear on the face of such a note (the series number, series year, portrait of Franklin, etc.). It is true that the reverse side of the paper bearing this impression was blank,[10] but, for purposes of this statute, the matter appearing on the reverse side of United States currency is clearly not an essential part of the obligation or promise to pay which it evidences (see R. 11). While, therefore, the simulated obligation of the United States represented by Exhibit G–17 was incomplete in the sense that its reverse side was blank, it was complete in all the essential features of such an instrument, *viz,* the promise to pay and the purported signatures o fauthorized officials of the Government. Cf. *United States* v. *Sprague,* 48 Fed. 828 (E. D. Wis.).[11]

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[10] A different exhibit (G–18, R. 18, 76), also found in petitioner's possession, bore the counterfeited impression of the reverse side of the bank note of which Exhibit G–17 was the counterfeit impression of the face.

[11] The courts have been very liberal in construing the term "obligation * * * made * * * after the similitude of any obligation * * * issued under the authority of

It is also true that the writing and figures on Exhibit G–17 were in reverse,[12] but that fact, we think, is immaterial. For, as the court below pointed out (R. 106–107), and as petitioner concedes (Br. 27–28), the well-settled criterion of whether a counterfeit obligation is "made * * * after the similitude of" a genuine United States obligation, within the meaning of the pertinent statutory language, is "whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when

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the United States," as used in the clause of the statute making possession of such an obligation a crime. The following types of instruments, it has been held, may properly be found by the jury to come within the proscribing language, provided, of course, the instrument in question sufficiently resembles in general appearance a genuine obligation of the United States as to deceive the unwary: an obligation of the "United States Silver Mining Company of Denver, Colorado," if bearing the purported signatures of the company's president and secretary (*United States* v. *Sprague*, 48 Fed. 828 (E. D. Wis.)); a stock certificate of the "Denver Mining Company" (*United States* v. *Fitzgerald*, 91 Fed. 374 (D. Wash.)); a genuine note of a duly chartered state bank whose currency had become worthless due to insolvency (*United States* v. *Stevens*, 52 Fed. 120 (W. D. Va.); an instrument consisting of two notes pasted back to back, one purporting to have been issued by the "Bank of the Empire State," and the other by the "Bank of Howardsville" (*United States* v. *Weber*, 210 Fed. 973 (W. D. Wash.)).

[12] That is, the writing and figures on the impression would read correctly only if its mirrored image were looked at.

dealing with a person supposed to be upright and honest." *Minella* v. *United States,* 44 F. 2d 48, 49 (C. C. A. 8); *United States* v. *Weber,* 210 Fed. 973 (W. D. Wash.); *United States* v. *Fitzgerald,* 91 Fed. 374 (D. Wash.); *United States* v. *Kuhl,* 85 Fed. 624, 632 (S. D. Iowa); *United States* v. *Sprague,* 48 Fed. 828, 829 (E. D. Wis.). And, according to the testimony of Greene (R. 63–66), an expert in counterfeiting matters (R. 60, 63), Exhibit G–17 met this test.[13]

4. *The instructions to the jury.*—Petitioner further contends (Br. 29–31) that the trial court erred in failing to instruct the jury in regard to the applicable law on the issue of whether the counterfeit impressions in evidence bore a sufficient resemblance to the genuine obligations they

[13] It is true that Greene qualified his affirmative answer to the question of whether Exhibit G–17 met this test by remarking that, before it could fool anybody, it would have to be trimmed down to the actual size of a genuine $100 bill by cutting off a border that was on it at the time it was found in petitioner's possession (R. 65–66). But since this trimming process would have taken but a moment, the presence of the border when the impression was found in petitioner's possession was insufficient in itself, we think, to prevent the impression from coming within the purview of the statute. In this connection it must be noted that the cases establishing the test of similitude above referred to were not concerned with counterfeit impressions having a border which made the entire instrument larger than the obligation it simulated. They were concerned with the degree of similarity between the lettering and general style of the counterfeit impression itself and that of the genuine obligation it imitated.

simulated as to make his counterfeiting and possessing them criminal. He requested no such instruction, however (see R. 90), nor did he take exception to the sufficiency of the instructions (see R. 96), nor, in fact, did he assign the now-alleged deficiency in the instructions in his "Grounds of Appeal" (R. 8). Clearly, therefore, he had no standing in the court below, nor has he standing in this Court, to challenge the adequacy of the instructions. See Rule 30, F. R. Crim. P.[14]

5. *The rulings on evidence.*—Petitioner further contends (Br. 31–33) that his counsel's cross-examination of certain government witnesses, in four enumerated instances, was unduly curtailed. It is well settled, however, that a trial judge has a wide latitude of discretion in permitting and limiting cross-examination, and there clearly was no abuse of discretion here.

(a) The trial judge's refusal to permit counsel to ask Koerner, the captain of the Camden detective bureau (R. 13), whether he would be deceived by the counterfeit impressions in evidence if an

[14] We would point out, however, that the question of whether the impressions in evidence were such likenesses of the obligations they simulated as to be calculated to deceive unsuspecting persons of average observation and care when dealing with supposedly honest persons—the test of similitude which has been laid down by the courts (see pp. 41–42, *supra*)—was thoroughly gone into at the trial (see R. 63–67), so that the jury were amply apprised of the nature of the test.

attempt had been made to pass them on him (R. 32) was proper, because, as the judge observed, the sufficiency of the resemblance between the counterfeit impressions and the genuine obligations they simulated was for the jury to decide, and whether Koerner would have been deceived was beside the point. As we have shown, *supra*, pp. 41–42, the test for the jury was not whether a professional police officer would have been deceived; it was whether the ordinary unsuspecting person would accept the counterfeit as genuine money.

(b) The refusal to permit counsel to question Clapp, the chemist (R. 43), concerning the cost of the various counterfeiting materials found in petioner's hotel room (R. 46) was also proper, since, as observed by the judge, it was entirely immaterial how much they cost.

(c) The refusal to permit counsel to question Erickson, the ink manufacturer (R. 47), as to whether one of the counterfeit impressions in evidence was a "good" impression (R. 49) was proper, because, as pointed out by the prosecutor in objecting, the question was clearly beyond the scope of the direct examination. If petitioner desired to obtain testimony from the witness to show that the counterfeit obligation was not similar to a genuine one, he should have placed the witness on the stand as a defense witness.

(d) Finally, the refusal to permit counsel to

pursue a line of inquiry, in his cross-examination of Greene, the Secret Service agent (R. 60), concerning whether or not an ordinary person, acting with ordinary care in a business transaction, would be deceived by the counterfeit impressions in evidence (R. 66–67) was based solely on the ground that the matter had already been fully covered in the cross-examination, as it had been (see R. 63–66). Plainly, therefore, the trial judge appropriately exercised his discretion in terminating this particular line of inquiry.

6. *The alleged inconsistency between count 3 of indictment No. 3829c and indictment No. 3875c.*— Petitioner's final argument is that the impressions were regarded in count 3 as being devices from which counterfeit obligations could be made and in the second indictment they were treated as being themselves the counterfeit obligations. It is urged, therefore, that the charges are inconsistent. But the short answer to the argument is that the impressions did have this dual character. By following the same process by which they were made, new impressions could be made from the counterfeit ones. And the counterfeit impressions were useable, too, for distribution in the channels of commerce. Any possible harshness in relying on the same act to establish two offenses (cf. *Gavieres* v. *United States,* 220 U. S. 338) is obviated here by the fact that there is no need to rely on count 3 to sustain the judgment (see *supra,* pp. 36–37).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 1389

EMIL LUSTIG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITIONER'S BRIEF ON REARGUMENT CONCERNING LEGALITY OF SEARCH AND SEIZURE

This is a reargument of an appeal which was originally heard by this honorable court on April 19, 1948. The statement of the case and of all of the facts relevant to this reargument are included in the brief on behalf of petitioner which was submitted in conjunction with the original argument, as aforesaid. In order to avoid needless repetition, facts or other matter which appeared in the original brief will not be reprinted herein, except as necessary for the purpose of presenting logically and with clarity the arguments herein.

Order of This Court Following Original Argument

The court, on June 21, 1948, entered the following order in this case:

> "This case is ordered restored to the docket and assigned for reargument. Counsel are requested to

discuss in their briefs and on oral argument the relevance of the legality of the search and seizure. (See Wolf *v.* People of the State of Colorado, Nos. 593-594, October Term, 1947). This case is transferred to the summary docket and assigned for hearing immediately following those cases."

Facts Concerning Original Argument

It was argued most strenuously on the original argument herein that under applicable decisions of this court the search and seizure herein was unreasonable, having been illegally made by state officers at the instance of, and in cooperation with, an officer of the federal government and, therefore, inimical to the provisions of the 4th Amendment to the Constitution of the United States. The government conceded that the search by the Camden police was illegal but argued non-cooperation with federal authority. On the instant reargument, petitioner renews all of the arguments presented concerning cooperation between state and federal officers with as much force and vigor as in his original presentation. However, in view of the request contained in the order of this court herein, and in view of the intense interest recently centered on the problems of search and seizure, especially the relation to searches made by state officials and their validity as affected by the 4th and 14th Amendments to the Constitution, the following further arguments are presented:

POINT I

This Honorable Court Should Correct Its Decision in Weeks v. United States, 232 U. S. 383, Wherein It States That the 4th Amendment Is Not Directed Against the Acts of State Officials.

It is submitted that a portion of the decision in *Weeks* v. *United States, supra,* should be corrected by this honorable court in the following particulars:

It will be remembered that in the mentioned case Weeks was arrested on charges of using the mails for the purpose of transporting lottery tickets in violation of the Criminal Code. He was arrested by a police officer without warrant at a railroad station in Kansas City, Missouri. Other police officers had gone to his house and, after entry and search, had taken possession of various papers and articles found therein which were turned over to a United States marshal. Later in the same day police officers together with the United States marshal, who thought he might find additional evidence, entered and searched the petitioner's room and carried away letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant.

In its opinion this court came to different conclusions concerning the two seizures; *i.e.*, the first made by the police officers acting alone, and the second made by the marshal accompanied by the police officers. The major portion of the opinion concerned the latter seizure and condemned the action of a United States official in making such an illegal search and seizure. Mr. Justice Day who delivered the opinion of the court stated (at p. 393):

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

Thus, the effect of the main portion of the decision of *Weeks* v. *United States, supra,* was (1) the 4th Amendment condemns unreasonable searches and seizures, and (2) the protection afforded thereby is a nullity unless the fruits of such search and seizure are suppressed and rendered inadmissible in a federal trial.

If we condemn the officer, whether federal, state or municipal, who is guilty of an unreasonable search, and at the same time permit the evidence to be used against a person who seeks protection of the amendment in a *federal court*, we find that the amendment affords no protection at all. Thus, this court, in its decision, stated that the amendment was not only directed against the illegal acts of the officer but also to the suppression of the evidence which the illegal search revealed.

If this 4th Amendment be limited as inhibiting merely the federal government, as other decisions of this court have held (*Barron* v. *Baltimore*, 7 Pet(US) 243; *Feldman* v. *United States*, 322 U.S. 487, 490), then it should follow that in order for persons to be secure in their homes, papers and effects as against invasions by the federal government, any evidence obtained by illegal search and seizure should be suppressed in a federal trial. *Weeks* v. *United States, supra*, condemns the use of the fruits of the unwarranted invasion more than the unwarranted invasion itself. An unwarranted invasion, while it might disturb the privacy of the citizen momentarily, although grave, does not have the irreparable effect of a criminal conviction based on the fruits of such unwarranted invasion. Therefore, it is submitted that the following part of the court's opinion in *Weeks* v. *United States, supra*, was in effect in contradiction to the major portion of the said opinion and should be corrected by this court. We quote from page 398:

> "As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. *What remedies the defendant may have against them we need not inquire,*

as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. Boyd case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and see Twining *v.* New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14." (Italics ours).

Thus, in a few sentences in the opinion, the court deviated from the rule of the case to exclude from the operation of the amendment the right of suppression in federal courts of tainted evidence which was originally secured by state officers. It is this deviation which petitioner contends most respectfully should never have been made. It emasculates the constitutional safeguards granted by the 4th Amendment. It allows the federal government to make use of illegally obtained evidence against its citizens and others, even though the plain mandate of the constitution is that the federal government shall not unreasonably interfere with the privacy of persons within its jurisdiction.

If the 4th Amendment is, therefore, of any effect at all, it can be effective to protect civil liberties only by the suppression of wrongfully obtained evidence; and if it is directed only against the federal government then all wrongfully obtained evidence should be suppressed in federal courts whether obtained by federal officers, state officers or private citizens. Unless the 4th Amendment is construed in the light of these arguments, the very principle upon which it is founded, that of freedom from unwarranted interference with private rights, will remain merely a principle to which the United States pays lip service and enforces only when the offending evidence is obtained directly by its own officers and employees.

Petitioner submits at this time that any use by the federal government of wrongfully seized evidence *ratifies* the original seizure as being made on behalf of, by, and for the government; and thereby violates the 4th Amendment.

In *Burdeau* v. *McDowell*, 256 U. S. 465, this court again stated that the 4th Amendment gave protection against unlawful searches and seizures only as against original governmental action, and the court held in that case that papers seized illegally by a private citizen which were turned over to federal authority at a later date should be admissible as evidence in a federal criminal trial. Again, in this case, which followed that portion of the *Weeks* case sought to be corrected herein, it would seem that the principle underlying the 4th Amendment was lost sight of.

A man was convicted because of an unreasonable search, and seizure of his private papers which were subsequently used as evidence against him in a federal criminal trial and the conviction was affirmed by this court. The rationale of the opinion was that the papers came into the government's possession without a violation of petitioner's rights by governmental authority. The fact that they were wrongfully taken by persons not connected with the government did not prevent them from being held for use in a criminal prosecution.

Mr. Justice Brandeis wrote a dissenting opinion in the case (pp. 476, 477), in which Mr. Justice Holmes concurred. In the dissenting opinion both justices were of the opinion that this court should not permit a law officer of the United States to retain evidence for use against an individual in a criminal case knowing such evidence to have been obtained by wrongful means.

If the fruits of wrongful invasion of private rights, either by federal or state officials, or private individuals, be subsequently used as evidence in a federal court, then the United States Government acquiesces in and accepts the original wrongful seizure and elects to treat such seizure as having been made originally on governmental behalf. The resulting ratification is clearly a violation of the provisions

of the 4th Amendment and should be heralded as such in a decisive opinion of this court.

It is most respectfully submitted that this honorable court correct the decision in *Weeks* v. *United States,* supra, by stating that although the 4th Amendment may not be directed as against state officers, it is nevertheless directed to federal officials to the extent that they may not use wrongfully obtained evidence in federal courts whether or not such evidence was obtained by federal or state officers or private individuals.

Point II

Under the Decision of Weeks v. United States, Supra, the Entry of Federal Agent Greene Into the Room of the Petitioner Before His Return and Arrest Was in Itself an Unreasonable Search and Seizure Which Violated the 4th Amendment.

As was pointed out to this honorable court at the beginning of Point I herein, the evidence wrongfully taken by the United States marshal in the *Weeks* case, *supra,* was held to be excluded. The pertinent facts were that after Weeks had been arrested by the local police and after the police had searched his room, the United States marshal went to the room with police officers and obtained some papers. It was this action of the marshal that this court held to be an unreasonable search and seizure.

In the instant case the action of federal agent Greene was even more arbitrary. Assuming, *arguendo,* that the original acts of Greene, in conjunction with the Camden police, did not constitute cooperation as a matter of law, and assuming that Greene's first interest in the case occurred upon his entering into the petitioner's room after the city police had made their illegal search, this entry alone was sufficient to constitute an unreasonable search and seizure

by an officer of the federal government. Greene had less cause to enter the premises of the petitioner in this case than the United States marshal had in the *Weeks* case. In the *Weeks* case the man had been arrested and evidence had already been obtained which pointed to his guilt. In this case no one had yet been arrested and the evidence which was uncovered by the city police was of dubious character. The city police themselves did not know whether such evidence was evidence of a federal crime.

Greene himself testified that at the time he received a call from the Camden police to come over, Sergeant Murphy told him that these people looked like they were making counterfeit money and he better come over. Greene's testimony implied that the city police were not certain at the time of the call that the equipment was evidence of counterfeiting (Rec. p. 74). It is undisputed that later on, after the petitioner returned and was arrested, agent Greene took all of the evidence away with him (Rec. p. 20). Thus, the federal agent arrived at the petitioner's room in his absence, made a search of what was in the room and retained such articles as he thought were relevant to a federal criminal prosecution for counterfeiting. It is submitted that this in itself was an unreasonable search and seizure by an officer of the federal government which renders the evidence seized inadmissible.

It was stated in *Weeks* v. *United States, supra,* at pages 393-394:

> "The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct viola-

tion of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused."

Point III

In Any Event, the 14th Amendment to the Constitution Has Reenacted the 4th Amendment So as to Apply Specifically to State Officials.

The 14th Amendment of the Constitution, in pertinent part, reads as follows:

> "* * * nor shall any State deprive *any person* of life, liberty, or property, without due process of law; * * *" (Italics ours).

Petitioner relies on the quoted clause of the 14th Amendment. Through this clause provisions of the original Bill of Rights, in which the 4th Amendment is included, apply to state action and state prosecutions. It is submitted that the provisions of the 4th Amendment along with the other amendments of the Bill of Rights constitute a basic conception of what is due process of law. If a state allows evidence to be admitted in criminal prosecution which was wrongfully obtained by a state officer, the defendant in such action would not receive due process of law under the 14th Amendment (*Adamson* v. *California*, 332 U. S. 46, see dissenting opinion of Mr. Justice Black, pp. 68-92, and dissenting opinion of Mr. Justice Murphy, pp. 123-125; *Bute* v. *Illinois*, Vol. 92, No. 14, L. ed. advance opinions, p. 735, see dissenting opinion of Mr. Justice Douglas, pp. 754-756; see also *re Oliver*, Vol. 92, No. 11, L. ed. advance opinions, p. 491).

Thus, if this were a prosecution by the State of New Jersey, the evidence obtained by the Camden city police as result of their search without search warrant of the peti-

tioner's room in his absence should have been suppressed. If the 14th Amendment serves and is directed against the action of states and the 4th Amendment is directed against the action of the federal government, then any evidence wrongfully obtained by either a state or a federal officer may not constitutionally be used in either a state or federal proceeding, or *vice versa*.

POINT IV

The Activities of Agent Green and the Detectives of the Camden City Police showed Cooperation Between State and Federal Officials as Matter of Law.

This point was argued at the original hearing before this Court and, therefore, petitioner will not at this time set forth argument at length. However, we desire to point out that the federal agent waited in police headquarters on a Sunday afternoon from approximately 2:30 to 5:00 P. M. with full knowledge that the city police were going to make a raid (Rec. pp. 70, 72). He (Greene) was curious to see what they would find, but stated that at that time he was no longer officially interested (Rec. p. 72). Yet, when he received the telephone call to come over at 5 o'clock, he went to the Walt Whitman Hotel in an official capacity. He took the results of his illegal search away from the hotel in an official capacity. On the following day when he swore out a complaint against the petitioner for counterfeiting, he did so in an official capacity. It is petitioner's contention that under the facts and circumstances in this case the trial judge should have found as matter of law that there was active cooperation between the state and federal authorities.

Conclusion

I

This Court should correct that portion of the decision in *Weeks* v. *United States, supra,* which holds that the 4th

Amendment is not directed against state officials. The 4th Amendment is directed against the use of the fruits of any unreasonable search and seizure by the federal government. This is the rationale of the *Weeks* case and should be clarified, as indicated herein, above, by correcting the small portion of that decision which is inconsistent therewith.

II

In any event the *Weeks* case shows that where a federal officer enters on premises without a warrant at the instance of, or even with state police, and himself obtains evidence, such evidence is inadmissible since such an entry and seizure is an unreasonable search and seizure.

III

And, finally, the 14th Amendment condemns illegal searches and seizures for the states themselves and in conjunction with the 4th Amendment renders inadmissible any evidence obtained by illegal search and seizure, whether by state or federal officer.

IV

The judgment of conviction and affirmance by the Circuit Court of Appeals herein should be reversed by this honorable court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 1389
OCT. T. 1946

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

This case was briefed and argued last term. The primary question considered at that time was the essentially factual issue whether the search and seizure, whereby the evidence was secured, was an exclusively state enterprise, or whether Mr. Greene, a United States Secret Service agent, had participated therein in such a manner or to such an extent as to make it in whole or in part a federal enterprise. Petitioner

conceded in effect that if the federal agent had not so participated, the evidence obtained by the state officers was admissible in the federal prosecution (Br. 8–12). On the other hand, the Government conceded that the search and seizure was illegal if judged by the standards of the Fourth Amendment (Brief for the United States, p. 19, fn 4) and, therefore that if it should be held that the federal agent actively participated therein (*Byars* v. *United States,* 273 U. S. 28), or if it was conducted solely for the benefit of federal prosecution (*Gambino* v. *United States,* 275 U. S. 310), the evidence secured thereby should have been excluded.

On June 21, 1948, this Court entered the following order:

> This case is ordered restored to the docket and assigned for reargument. Counsel are requested to discuss in their briefs and on oral argument the relevance of the legality of the search and seizure. (See *Wolf* v. *People of the State of Colorado,* Nos. 593–594, October Term, 1947.) This case is transferred to the summary docket and assigned for hearing immediately following those cases.

In the *Wolf* cases, evidence seized by state officers was admitted in evidence in a state criminal prosecution. The petitioners in those cases contend (1) that the search and seizure was illegal and (2) that the Fourteenth Amendment requires

the exclusion of the evidence obtained thereby. The state argues (1) that the search and seizure was lawful and (2) that even if it was not, the evidence is nevertheless admissible.

We assume that the Court is satisfied in the case at bar that the search and seizure was entirely a non-federal enterprise, because the evidence was concededly inadmissible if the search and seizure should be held to have been a federal or a joint federal-state enterprise. It is our position that the legality of the search and seizure is immaterial to the question of the admissibility of the evidence. Our research has failed to disclose any cases or state statutory or constitutional provisions which definitively determine the legality of the search and seizure under the law of New Jersey, where the acts took place.[1] And since, in our view, the legality of the search and seizure

[1] The New Jersey Constitution, Article I, par. 6, reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

It should be noted that New Jersey has consistently followed the rule that relevant, competent evidence is not rendered inadmissible by the fact that it was obtained through an illegal search and seizure. *State* v. *Lyons*, 99 N. J. L. 301, 303, 122 Atl. 758; *State* v. *Black*, 5 N. J. Misc. 48, 135 Atl. 685 (considering and rejecting the federal exclusion rule); *State* v. *Gillete*, 103 N. J. L. 523, 524, 138 Atl. 381.

under state law is irrelevant in this case, it will not be necessary to conjecture how the highest court of New Jersey would dispose of that issue. For the same reason, it is unnecessary to determine whether state or federal law would govern the legality of the search and seizure.[2]

SUMMARY OF ARGUMENT

I

Commencing with *Boyd* v. *United States,* 116 U. S. 616, and consistently since *Weeks* v. *United States,* 232 U. S. 383, the federal courts have

[2] It is our opinion, however, that if the legality of the search and seizure were relevant, it should be determined by state law since it was a state enterprise, and it would be most anomolous to hold evidence secured by state officers, in full compliance with their prescribed functions and obligations, inadmissible in a federal court merely because the federal Government might impose somewhat different details of obligations upon its officers in the execution of their duties. Cf. *United States* v. *Di Re,* 332 U. S. 581, 589, where a state officer made an arrest without warrant for a federal offense. The Court said: "We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." We can see no reason why the rule should be any different in a case involving a search and seizure by a state officer, particularly where, as in the instant case, the entry was made for arrest under a local ordinance. There appears to be no applicable federal statute. 18 U. S. C. 492 (based on 18 U. S. C., 1940 ed., § 286), covering forfeiture of counterfeit paraphernalia, prescribes no rules governing the method of search and seizure. 18 U. S. C. 2236 (based on 18 U. S. C., 1940 ed., § 53a), making illegal search and seizure a criminal offense, applies only to "an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States."

held inadmissible in federal criminal proceedings evidence obtained by federal officers through searches and seizures in violation of the Fourth Amendment. Simultaneously, beginning with *Weeks* v. *United States, supra,* this Court has held admissible in federal criminal proceedings evidence obtained through illegal searches and seizures by state officers, without participation by federal officers. Both of these rules have been followed in innumerable cases in the lower federal courts. The problem has always been treated as involving only the Fourth Amendment, and as not involving the prohibition of the Fifth Amendment against compulsory self-incrimination.

II

There is no reason in policy or law to reverse the long-standing rule of *Weeks* v. *United States,* admitting in federal criminal proceedings evidence obtained through illegal searches and seizures by state officers.

A. The purpose of the general federal rule of excluding evidence obtained through illegal searches and seizures by federal officers is to implement the Fourth Amendment effectively by denying to the federal government any benefit from the illegal acts of its officers. Under this rule, therefore, effective pressure is placed upon federal officers to obtain evidence by methods which do not violate the Fourth Amendment.

Where the illegal search and seizure is by state officers, who are not subject to training and control by the federal government, the exclusion from federal criminal proceedings of evidence thus obtained, accomplishes no beneficial result. Violations of federal law will go unpunished, although the federal government cannot control local police procedures.

B. The continued application of the long-established *Weeks* rule violates no constitutional right of the petitioner. Where, as here, the search and seizure were made by state officers, the Fourth Amendment is not applicable. The privileges and immunities clause of the Fourteenth Amendment does not assimilate rights protected against federal encroachment by the Fourth Amendment; that clause protects against state action only those privileges and immunities inherent in *national* citizenship in a federal system.

The admission in federal criminal proceedings of evidence illegally seized by state or local officers does not deprive petitioner of liberty or property without due process of law within the meaning of the Fifth or Fourteenth Amendments. Due process embraces those standards of procedure which are "the very essence of a scheme of ordered liberty." The fact that the majority of the states, together with England and Canada, admit relevant evidence regardless of the illegal-

ity of the means by which it was obtained, demonstrates that the exclusion of evidence obtained by a wrongful search and seizure is not one of the elements of due process of law. In fact, this Court has never held that the immunity from unreasonable searches and seizures itself is one of the fundamental rights embraced by the concept of due process. *A fortiori,* due process does not require enforcement of the immunity by the indirect sanction of exclusion of evidence.

ARGUMENT

I

EVEN IF THE EVIDENCE WAS ILLEGALLY OBTAINED BY STATE OFFICERS, ITS ADMISSION IN FEDERAL CRIMINAL PROCEEDINGS HAS LONG BEEN PERMITTED UNDER DECISIONS OF THIS COURT

A. At common law, and originally in the federal courts, the admissibility of evidence was not affected by the manner in which it was obtained

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment is silent as to the admissibility in legal proceedings of evidence obtained in violation of its prohibition. At common law, the legality of the means by which evidence was obtained was irrelevant to its admissibility and, as we shall later point out, this is still the rule in many states and in England and Canada. The admissibility rule was originally followed in the federal courts, although apparently not considered by this Court. Thus, in *United States* v. *La Jeune* (1822), 2 Mason 409, 26 Fed. Cas. 832, 843–844, No. 15,551 (C. C. D. Mass.), Justice Story, sitting on circuit, rejected a contention that where there was no right to search the evidence discovered by such search could not be used, stating that "In the ordinary administration of municipal law the right of using evidence does not depend, nor as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained." Thirty-eight years later, in *Stockwell* v. *United States,* 3 Cliff. 284, 23 Fed. Cas. 116, 123, No. 13,466 (C. C. D. Maine), affirmed, 13 Wall. 531, Justice Clifford, on circuit, in applying the admissibility rule, relied upon Justice Story's decision in the *La Jeune* case, as well as upon Massachusetts (*Commonwealth* v. *Dana,* 2 Metc. 329) and English (*Legatt* v. *Tollervey,* 14

East 302; *Jordan* v. *Lewis,* 14 East 305 note) cases.[3]

B. The present federal rule of excluding illegally seized evidence applies only to evidence seized by federal officers in violation of the Fourth Amendment

The first break with the common law rule of admissibility came in 1886 when, in *Boyd* v. *United States,* 116 U. S. 616, this Court held that a statute requiring the production of books and papers in certain forfeiture cases and providing that failure to produce should constitute an admission of the government's allegations as to their contents, violated the prohibitions of the Fourth and Fifth Amendments against unreasonable searches and seizures and against compulsory self-incrimination. Chief Justice Waite and Mr. Justice Miller, concurring, expressed the view that the decision should have been based solely upon the immunity from compulsory self-incrimination, no search or seizure having been involved. This latter view of the case has been widely accepted. 8 Wigmore, Evidence (3d ed.) § 2264,

[3] For other cases applying the earlier Federal rule of admissibility see *United States* v. *Hughes*, 12 Blatch. 553, 26 Fed. Cas. 417 (C. C. S. D. N. Y.); *Bacon* v. *United States*, 97 Fed. 35, 40 (C. C. A. 8), certiorari denied, 175 U. S. 726; *Hardesty* v. *United States*, 164 Fed. 420 (C. C. A. 6); *Hartman* v. *United States*, 168 Fed. 30, 33–34 (C. C. A. 6); *Ripper* v. *United States*, 178 Fed. 24 (C. C. A. 8), rehearing denied, 179 Fed. 497, certiorari denied, 218 U. S. 680.

pp. 363–373; Fraenkel, *Concerning Searches and Seizures,* 34 Harv. L. R. 361; Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 Ill. L. R. 303, 307.

In any event, beginning with this Court's decision in *Weeks* v. *United States,* (1914) 232 U. S. 383, federal courts have regularly excluded, upon timely motion, evidence obtained by federal officers in violation of the Fourth Amendment. The purpose and effect of the *Weeks* rule of exclusion is to add another sanction to the enforcement of the prohibition of the Fourth Amendment. Thus, this Court stated (pp. 393–394):

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. * * * To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

In the same *Weeks* case, this Court also held that evidence obtained by state officers through an illegal search and seizure was admissible in

a federal criminal proceeding. On this aspect of the *Weeks* case, it was said (p. 398):

> * * * As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies. *Boyd Case,* 116 U. S., *supra,* and see *Twining* v. *New Jersey,* 211 U. S. 78.

This rationale of the *Weeks* case was applied in *Burdeau* v. *McDowell,* (1921) 256 U. S. 465, to hold admissible in a Federal criminal proceeding evidence wrongfully taken from the defendant by a private individual. Other decisions of the Court laid down the obvious qualification that evidence illegally seized by state officers is not admissible in federal proceedings if federal officers participated in the illegal search, or if the state officers were acting solely on behalf of the

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federal government, or, more generally, if the illegal search and seizure was actually a federal enterprise. *Byars* v. *United States,* 273 U. S. 28; *Gambino* v. *United States,* 275 U. S. 310.

The general rule of exclusion was thereafter applied in varying situations. Cf. *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385; *Amos* v. *United States,* 255 U. S. 313; *Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20. At no time, however, has this Court indicated that the exclusion rule extended to evidence secured by others than federal officers or persons acting solely on behalf of or in cooperation with federal officers. For example, Mr. Justice Brandeis, speaking for the Court in the *Gambino* case, where evidence was held inadmissible in a federal criminal prosecution because illegally secured by state officers acting "solely on behalf of the United States," said (275 U. S. at 317):

> The conclusion here reached is not in conflict with any of the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes.

In *Olmstead* v. *United States,* 277 U. S. 438, it was held that evidence secured by wire-tapping, which concededly was illegal, was admissible in a federal criminal prosecution. Mr. Chief Justice

Taft, speaking for a majority of the Court, said (pp. 462, 463, 468):

> The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. * * *
>
> *Gouled* v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. * * *
>
> * * * * *
>
> Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numer-

> ous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.
>
> A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The rationale of the *Olmstead* decision was in no manner undermined or restricted by the later cases of *Nardone* v. *United States,* 302 U. S. 379, *Nardone* v. *United States,* 308 U. S. 338, and *Weiss* v. *United States,* 308 U. S. 321, which held that Section 605 of the Federal Communications Act had the effect of making evidence obtained by wiretapping inadmissible in federal criminal proceedings. In *Goldman* v. *United States,* 316 U. S. 129, 135–136, the Court followed the *Olmstead* case, expressly declining to overrule it.

This Court has several times reasserted and affirmed the principles established by the *Weeks* and *Burdeau* cases. For example, in *McGuire* v. *United States,* 273 U. S. 95, 99, the Court said, per Stone, J.:

> * * * A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465; *Adams* v. *New York,* 192 U. S. 585; *Weeks* v. *United States,* 232 U. S. 383, 398.

And again, as recently as 1944, in *Feldman* v. *United States,* 322 U. S. 487, 492, it was said:

> And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, *Weeks* v. *United States, supra; Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials.

The clearly established rule that evidence illegally seized by state officers, acting independently of federal officers, is admissible in federal criminal prosecutions, has been consistently followed in innumerable decisions in every circuit.[4]

This Court's decisions make it clear that the use against petitioner in a federal criminal proceeding of evidence obtained through an illegal search and seizure by state officers does not infringe his immunity from compulsory self-incrimination under the Fifth Amendment. The majority of this Court in the *Boyd* case based its decision on the prohibition of the Fifth Amendment against self-incrimination, as well as upon the Fourth Amendment (*supra,* p. 9). However, in 1904, this Court, distinguishing the *Boyd* case, held that the admission in evidence in a state

[4] Some typical cases, representing but a small fraction of the reported decisions, are *United States* v. *Diuguid*, 146 F. 2d 848 (C. C. A. 2), certiorari denied, 325 U. S. 857; *Miller* v. *United States*, 50 F. 2d 505, 507 (C. C. A. 3), certiorari denied, 284 U. S. 651; *Wheatley* v. *United States*, 159 F. 2d 599, 601 (C. C. A. 4); *Shushan* v. *United States*, 117 F. 2d 110, 117 (C. C. A. 5), certiorari denied, 313 U. S. 574, rehearing denied, 314 U. S. 706; *Lotto* v. *United States*, 157 F. 2d 623, 625–626 (C. C. A. 8), certiorari denied, 330 U. S. 811; *Butler* v. *United States*, 153 F. 2d 993, 994 (C. C. A. 10).

So far as we have been able to ascertain, the only federal case not following the rule is *Dukes* v. *United States*, 275 Fed. 142, 144–146 (C. C. A. 4). This case, however, was expressly overruled in *Kanellos* v. *United States*, 282 Fed. 461, 462 (C. C. A. 4).

criminal proceeding of the defendant's private papers seized by state officers did not violate his immunities against unreasonable searches and seizures or compulsory self-incrimination. *Adams* v. *New York,* 192 U. S. 585. As to the latter, the Court pointed out that (pp. 597–598):

> The Supreme Court of the State of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the private papers of the accused, * * *. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them.

Mr. Justice Holmes, speaking for the Court in *Johnson* v. *United States,* 228 U. S. 457, 458, summed the situation up as follows:

> A party is privileged from producing the evidence but not from its production.

Although in *Weeks* v. *United States, supra,* the petitioner had asserted violation of his rights under both the Fourth and Fifth Amendments, this Court limited its consideration to the Fourth Amendment in approving the admission of the evidence obtained by the state officers. In the subsequent application by the federal courts of

the dual doctrine of the *Weeks* case,[5] the constitutional immunity against compulsory self-incrimination has been no obstacle.

Although the Fourth and Fifth Amendments are to some extent and in some contexts "intertwined" and "throw great light on each other" (*Feldman* v. *United States,* 322 U. S. 487, 489, 490; cf. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208 ff.; but cf., also, dissenting opinion of Mr. Justice Black in the *Feldman* case, at 502–503), we submit that the present case does not involve the constitutional immunity against compulsory incrimination, or what has been referred to as "testimonial compulsion" (*Twining* v. *New Jersey,* 211 U. S. 78, 91), since petitioner was at no time compelled to testify or to produce evidence against himself. Cf. *People* v. *Defore,* 242 N. Y. 13, certiorari denied, 270 U. S. 657; *Dozier* v. *State,* 107 Ga. 708, 710, 33 S. E. 418. This, of course, is necessarily so. If obtaining evidence other than testimony from the defendant against his will is equivalent to compelling the defendant "to be a witness against himself," then not even a search valid under the Fourth Amendment will satisfy the command of the Fifth. 8 Wigmore, *Evidence,* p. 370.

[5] It should be observed that the *Weeks* rule of exclusion is limited to evidence secured in contravention of the Fourth Amendment. The Court has not extended the doctrine to evidence otherwise illegally secured by federal officers, as, for example, by trespass. *Hester* v. *United States,* 265 U. S. 57, opinion by Holmes, J.

The self-incrimination immunity of the Fifth Amendment expressly and directly controls judicial procedure, providing, as it does, that no person "shall be compelled in any criminal case to be a witness against himself." Cf. *Burdeau* v. *McDowell,* 256 U. S. 465, 475. The Fourth Amendment, on the other hand, does not deal with procedural or evidentiary matters, but rather asserts "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Cf. *Harno,* op. cit., pp. 312–313; comment, *Search, Seizure and the Fourth and Fifth Amendments,* 31 Yale L. J. 518, 522. Thus, as distinguished from the use of subpoenas or other testimonial compulsion against a criminal defendant, the admission or exclusion of evidence illegally seized from him does not fall within the direct scope or wording of the constitution, but rather the rule of evidence comes into play only indirectly, as an implementation of the basic right, which the Fourth Amendment protects only against violation by federal officers, and not by state officers. *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58, 71; *Bolln* v. *Nebraska,* 176 U. S. 83, 86; *Brown* v. *New Jersey,* 175 U. S. 172, 174; *McElvaine* v. *Brush,* 142 U. S. 155, 158; *Livingston* v. *Moore,* 7 Pet. 469, 551–552. In other words, the Fifth Amendment itself prohibits a federal court's receiving certain types of evidence; the Fourth Amendment

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merely prohibits legislative and executive invasion of a person's privacy, and the federal courts have adapted their procedure to help enforce this prohibition. Cf. 1 Greenleaf, *Evidence* (16th ed.) § 254a, p. 394.

II

THERE IS NO REASON IN LAW OR IN POLICY TO EXTEND THE WEEKS RULE OF EXCLUSION TO EVIDENCE ILLEGALLY SEIZED BY STATE OR MUNICIPAL OFFICERS

There is no reason in law or in policy to extend the exclusion doctrine[6] to embrace evidence illegally seized by others than federal officers, thus overruling the equally unequivocal holding of the

[6] The federal exclusion rule of the *Weeks* case has been the subject of much controversy. Wigmore has been the most vociferous and articulate critic of the rule. 8 Wigmore, *op. cit.*, §§ 2183, 2184, 2184a, 2184b; cf. § 2264; Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A. B. A. J. 479. See, also, Harno, *op. cit.;* Knox, *Self-Incrimination*, 74 U. of Penn. L. R. 139; Nelson, *Search and Seizure: Boyd vs. United States*, 9 A. B. A. J. 773. Among the literature on the other side of the *Weeks* argument, namely in support of the exclusion rule, are Cornelius, *Search and Seizure* (Second Edition), § 7–9, pp. 36–46; Fraenkel, *One Hundred and Fifty Years of the Bill of Rights*, 23 Minn. L. R. 719, 741–744 (reprinted with a supplement covering 1939 through 1944 by The American Civil Liberties Union); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. R. 361; Chafee, *The Progress of the Law, 1919–1922*, 35 Harv. L. R. 673, 694–704; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 Col. L. R. 11; Glenn, *Evidence Obtained by Illegal Search and Seizure*, 22 Ky. L. J. 63.

Weeks case that evidence illegally seized by state officers is admissible in federal criminal trials. As pointed out above, to hold evidence illegally seized by state officers without the cooperation of federal officers inadmissible in the federal courts would overturn long established principle and practice.

A. To exclude such evidence would penalize the federal Government for acts of persons over whom it had no control

The important policy considerations of those courts rejecting the *Weeks* exclusion rule have perhaps best been stated by Mr. Justice Cardozo in *People* v. *Defore,* 242 N. Y. 13, 23, 24, 25:

> We are confirmed in this conclusion [that illegally seized evidence is properly admissible] when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of

forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice. * * * No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams[7] case strikes a balance between opposing interests.

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[7] The reference is to the opinion of the New York Court of Appeals in the *Adams* case, *People* v. *Adams*, 176 N. Y. 351, 363, where it was said: "The appellant in his final point argues that the court erred to the prejudice of the defendant in refusing to allow evidence as to the non-existence of a search warrant at the time the papers were removed from the office of defendant.

"We have already pointed out that the court will not take notice of the allegation that the possession of the papers offered in evidence on a criminal trial has been unlawfully acquired.

"It follows that the questions asked of the witness Cuff were immaterial. The fact that an officer, engaged in the search of defendant's office for papers, testified that there was a search warrant does not vary the situation."

In the *Weeks* case, this Court had held that the Fourth Amendment to the federal Constitution interdicted "the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises." (232 U. S. at p. 393). As pointed out by Mr. Justice Cardozo in *People* v. *Defore, supra,* at 23–24, in the majority of cases the practical effect of suppressing and/or returning illegally seized evidence is that the criminal goes free, to the serious detriment of society at large. It may be conceded that, as a matter of policy, it is quite reasonable and salutary that the interests of the federal Government in the punishment of criminals yield to the Government's interest in disciplining its own agents and officers in the performance of their duties under their oath to support the federal Constitution.

However, if this Court should now reverse its earlier decisions and hold inadmissible in federal prosecutions evidence obtained by state officers through an illegal search and seizure, there would

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In view of this, the statement of the Court in *Weeks* v. *United States, supra,* at 396, that "The decision in [the *Adams*] case rests upon incidental seizure made in the execution of a legal warrant * * *" is open to some question.

be no such beneficial result. State law enforcement officers are not subject to the control of the federal government. The law enforcement officers of the states range from highly trained full-time police to part-time constables and deputy-sheriffs with little, if any, legal knowledge. The federal government plainly is without authority to impose qualifications of training and temperament with respect to such local officers.

So it is that a local constable searching for stolen chickens could confer practical immunity for the most serious federal crimes, if the present rule were changed. Yet, there is nothing which the government could do to prevent such an illegal search or to prevent its repetition. Admitting the desirability of implementing and enforcing the Fourth Amendment at the cost of leaving an occasional criminal unpunished, we believe that to apply the rule of exclusion to this situation would accomplish nothing in preventing illegal searches and seizures. As said in *Feldman* v. *United States*, 322 U. S. 487, 492–493, "The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. * * * Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite

beyond the reach even of the most alert watchfulness by law officers of the Government."[8]

In this connection, the reasoning of Mr. Justice Brandeis in his famous dissenting opinion in the *Olmstead* case is significant. His view, and that of Mr. Justice Holmes, was that the Government, by making use of evidence obtained by the illegal acts (wire-tapping) of its own agents, was in effect ratifying such acts and would itself become a lawbreaker (pp. 480, 482, 483). Mr. Justice Brandeis (at 481) expressly distinguished *Burdeau* v. *McDowell, supra.* Certainly the doctrine of "ratification" cannot logically be extended to the illegal acts of persons whom the Government does not pay or employ or supervise.[9] By accepting evidence secured by strangers, the federal Government can hardly be said to make those persons its agents any more than it can be said to become a party to a crime by "ratification" when it presents the testimony of co-conspirators. Thus the doctrine of ratification would seem to be utterly inapplicable.

[8] It is not, therefore, necessary to go the whole way and urge, as do Mr. Justice Cardozo (*People* v. *Defore*, *supra*, at 21–22) and Wigmore (8 *Evidence*, p. 41), that all illegally seized evidence should be treated alike, irrespective of its source. It is quite consistent to exclude evidence illegally seized by federal officers, as a means of enjoining upon those officers the proper performance of their duties, while admitting evidence illegally obtained by others and made available to the federal Government without fault on its part.

[9] In his dissent in *Burdeau* v. *McDowell*, 256 U. S. at 476–477, Mr. Justice Brandeis did not purport to apply the principle of ratification.

B. No federal constitutional right of petitioner has been violated

1. *The Fourth Amendment is not involved.*— Here the illegal search and seizure were made by state officers. From *Barron* v. *Baltimore,* 7 Pet. 243, on, this Court has held that the Bill of Rights, i. e., the first eight amendments, "was for the protection of the individual against the federal government and that its provisions were inapplicable to similar actions done by the states." *Adamson* v. *California,* 332 U. S. 46, 51. It is enough to cite the *Adamson* case for the proposition that the Fourteenth Amendment does not make the Bill of Rights as such applicable to state action. In *Weeks* v. *United States, supra,* (p. 398), it was specifically held that the Fourth Amendment was not applicable to state officers, this Court declaring that "Its limitations reach the Federal Government and its agencies," citing *Twining* v. *New Jersey,* 211 U. S. 78. At the same term, in *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58, 71, and in another context, it was held that the Fourth Amendment does not apply to the states.

Further, assuming that some principle analogous to "ratification" did come into play, the question would be: "What has been ratified?" The acts of the state or municipal officers may have been illegal, they may have violated the constitution of the state, but they did not conflict with

the Fourth Amendment of the United States Constitution, since the state officers' actions were not controlled by that amendment. The basic distinction between the search and seizure, which constitutes whatever violation of the defendant's rights has been perpetrated, and the admission of evidence must be kept in mind.[10] The conflict among the decisions appears to revolve around the various courts' judgments as to whether the admission of evidence illegally seized emasculates the applicable constitutional protection against unreasonable searches and seizures. This Court believes that the exclusion of evidence illegally seized by federal officers is necessary to make fully effective the protection of the Fourth Amendment. *Weeks* v. *United States, supra,* at 392. Other courts following the so-called federal rule similarly believe that the exclusion of evidence illegally seized by state officers is necessary to implement the search and seizure guaranties of the respective state constitutions. Those state courts adhering to the common law rule of admissibility believe that the exclusion of evidence is an indirect sanction for enforcing their consti-

[10] As one writer, in criticizing the federal exclusion rule of the *Weeks* case, has said: "We have, in these illegal seizure cases, overlooked the fact that when the evidence is brought to trial, the constitutional right is already violated, and excluding the evidence does not amend the violation nor effectively prevent its recurrence." Note, 22 Cornell L. Q. 585, 589.

tutional provisions which is neither demanded nor authorized by these provisions. *People* v. *Defore, supra; Commonwealth* v. *Wilkins,* 243 Mass 356, 138 N. E. 11; *State* v. *Lindway,* 131 Ohio St. 166, 2 N. E. 2d 490; *State* v. *Black, supra,* 5 N. J. Misc. 48, 50. The important point to bear in mind is that in all the cases, the issue relates to a rule of evidence.

2. *The privileges and immunities clause of the Fourteenth Amendment is not involved.*—This Court has never held that immunity against unreasonable searches and seizures is a privilege or immunity of citizens of the United States which is protected against violation by state officers by the Fourteenth Amendment. In fact, this Court specifically declined to determine that question in *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553, and in *Adams* v. *New York, supra,* at 594. In *Hague* v. *Committee for Industrial Organization,* 101 F. 2d 774, 787, the Circuit Court of Appeals for the Third Circuit held that the prohibition against unreasonable searches and seizures by federal officers contained in the Fourth Amendment was made applicable to state authorities by the Fourteenth Amendment. On certiorari, Mr. Justice Roberts, writing one of the opinions of the Court, expressly withheld approval of this holding by the circuit court of appeals, and declined to discuss or decide "the question whether exemption from the searches and seizures proscribed by the Fourth Amendment is

afforded by the privileges and immunities clause of the Fourteenth." *Hague* v. *C. I. O.*, 307 U. S. 496, 517.[11] None of the other opinions in the case mentions the search and seizure issue, and there is no indication of approval by any member of the Court of the gratuitous statement of the court of appeals.

We believe it clear that the immunity against unreasonable searches and seizures is not a privilege or immunity inherent in United States citizenship as such. *Slaughter-House Cases,* 16 Wall. 36; *Twining* v. *New Jersey,* 211 U. S. 78, 90–99; cf. opinion of Stone, J., in *Hague* v. *C. I. O.*, 307 U. S. at 519–521, particularly footnote 1, where the authorities are collected and discussed; and concurring opinion of *Frankfurter,* J., in *Adamson* v. *California, supra,* at 61–62. All the states provide immunity against unreasonable searches and seizures by state officers. Neither the original federal Constitution nor the Bill of Rights nor the Fourteenth Amendment created this right in the people. Cf. *Minor* v. *Happersett,* 21 Wall. 162; *Barron* v. *Baltimore,* 7 Pet. 243, 247–248. The only privilege or immunity of citizens of the United States possibly involved is that created by

[11] In *Reeve* v. *Howe*, 33 F. Supp. 619, 623 (E. D. Pa.), the court adopted the dictum of the circuit court of appeals in *Hague* v. *C. I. O.* The statement, however, was not necessary to the decision of the district court, which involved the suppression of evidence obtained by a search and seizure in which the court found that the federal Government had participated.

the Fourth Amendment, namely the immunity from unreasonable search and seizure by *federal officers.* We submit, therefore, that the privileges and immunities clause of the Fourteenth Amendment cannot possibly be deemed to incorporate the immunity against unreasonable searches and seizures contained in the Fourth Amendment.[12]

3. *There has been no denial of due process as guaranteed by the federal Constitution.*—The remaining question is whether the use against a defendant in a federal criminal proceeding of evidence obtained from him by an illegal search and seizure by state officers, violates the provisions of the Fifth or Fourteenth Amendments that no person shall be deprived of liberty without due process of law. At this point, it should be recalled that the Fourth Amendment is not applicable to state officers, and that in the instant case the illegally obtained evidence would be admissible in

[12] It should further be observed that on the present record it is at least doubtful whether petitioner could claim the protection of the privileges and immunities clause, since it is not clear from the record that he is a citizen of the United States. Cf. *Hague* v. *C. I. O.*, *supra.* He was born in England and then went to Austria (R. 86). He later came to the United States, but there is some indication that he then returned to Vienna (R. 87). The suggestion that in 1917 he was considered an American citizen (R. 86) is not substantiated, and the meager, confused facts elicited on his cross-examination do not provide any basis of plausibility of the existence of United States citizenship at that time. However, since he has been permitted to proceed *in forma pauperis* in this Court, we have not sought to question his United States citizenship.

the courts of New Jersey, whose officers made the search and seizure here involved. We think it clear that if the due process clause of the Fourteenth Amendment permits states which so desire to admit evidence obtained by an illegal search and seizure, then the due process clause of the Fifth Amendment permits the federal government to do so in cases to which the Fourth Amendment is not applicable.

This Court has repeatedly and recently held that whether a person has been denied due process of law does not depend upon whether the official action involved would be illegal under specific provisions of the federal Bill of Rights. *Adamson* v. *California,* 332 U. S. 46; *Palko* v. *Connecticut,* 302 U. S. 319; *Twining* v. *New Jersey,* 211 U. S. 78; *Maxwell* v. *Dow,* 176 U. S. 581; *Hurtado* v. *California,* 110 U. S. 516. In brief, the issue under the due process clause of the Fifth Amendment is whether the admission in a federal criminal proceeding of evidence obtained through a wrongful search and seizure by state officers, violates "the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut, supra,* at page 325, or "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government", *Twining* v. *New Jersey, supra,* at page 106.

At this point, it is of great significance that

not all Anglo-American jurisdictions subscribe to the general federal rule of exclusion of evidence obtained by wrongful search and seizure. From the earliest times,[13] it has been the accepted rule at common law that the legality of the means by which evidence was obtained was irrelevant to its admissibility in evidence. *Legatt* v. *Tollervey,* 14 East 302 (1811); *Jordan* v. *Lewis,* 14 East 305, note; *The Queen* v. *Granatelli,* 7 St. Tr. (N. S.) 979, 987 (1849). As early as 1723, this rule was applied in a criminal case to evidence secured by intercepting the mails. *Proceedings against Bishop Atterbury,* 16 St. Tr. 323, 495–496, 629–630 (1723). Cf. *The King* v. *Earbury,* 2 Barn. K. B. 346 (1733). Apparently, this has continued to be the English rule, *Elias* v. *Pasmore* [1934] 2 K. B. 164, despite the early and uncompromising condemnation of and relief against general warrants and unreasonable searches and seizures. Cf. *Entick* v. *Carrington,* 19 St. Tr. 1029 (1765); *Huckle* v. *Money,* 2 Wils.

[13] Although there have been some attempts made to trace the immunity from unreasonable searches and seizures back to the Magna Charta, there appears to be no justification for this view historically. Cf. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 Col. L. R. 11, 14, where, concerning the Fourth and Fifth Amendments it is said: "Neither can be traced to Magna Charta except in a very faint and general way." See, also, Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press, 1937), pp. 19–21.

K. B. 206 (1763); *Leach* v. *Money*, 3 Burr. 1692, 19 St. Tr. 1001.[14] The Canadian cases uniformly hold that evidence secured through illegal search and seizure is inadmissible.[15] As we have seen, the earlier federal cases upheld the admissibility of such evidence (*supra*, pp. 8–9).

The great weight of authority among the states, all having constitutional provisions granting immunity against unreasonable searches and seizures,[16] supports what is admittedly the com-

[14] Cf. *Adams* v. *New York*, 192 U. S. 585, 598: "The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent."

[15] *Regina* v. *Doyle*, 12 Ont. R. 347, 353–355 (Queen's Bench Div.); *Rex* v. *Nelson*, 69 D. L. R. 180, 185 (Alberta Sup. Ct.); *Rex* v. *Gibson*, 30 Can. Cr. Cas. 308 (Alberta Sup. Ct.); *Rex* v. *Duroussel*, [1933] 2 D. L. R. 446 (Manitoba Ct. of App.); *Rex* v. *Lee Hai*, [1935] 3 D. L. R. 448, 450–451 (Manitoba Ct. of App.); *Rex* v. *Kostachuk*, 54 Can. Cr. Cas. 189, 191–192 (Saskatchewan Ct. of App.); *Rex* v. *Honan*, 20 Can. Cr. Cas. 10, 16 (Ont. Ct. of App.).

[16] The state guaranties are collected in Cornelius, *Search and Seizure* (2d ed.), § 2, fn. 14, pp. 8–11. Prior to 1939 the guaranty was purely statutory in New York (Sec. 8, Civil Rights Laws, c. 8), but it is now included in Article I, sec. 12, of the New York Constitution.

mon law rule of admissibility. Although there was some tendency among the states to change from the rule of admissibility to the rule of exclusion after this Court's decision in *Weeks* v. *United States, supra,* the majority remained in the admissibility column,[17] several states expressly rejecting the *Weeks* doctrine.[18] Since the state courts have vacillated somewhat on the question, no classification of the various jurisdictions remains valid for any length of time (cf. Atkinson, *Prohibition and the Doctrine of the Weeks Case,* 23 Mich. L. R. 748, 764). However, from time to time the cases have been collected and classified.

[17] Cf., for example, 88 A. L. R. 348–349 (1934): "It appears from the cases subsequent to the annotation in 52 A. L. R. 477 [1928], where a summary of jurisdictions revealed twenty-eight states following the rule of admissibility and sixteen following the rule of inadmissibility, that Pennsylvania and Vermont have definitely adopted the rule of admissibility, while South Dakota has changed to the rule of inadmissibility, and Washington, where the question had not been settled, has likewise adopted the rule of inadmissibility."

[18] See Andrews, *Historical Survey of the Law of Searches and Seizures,* 34 Law Notes 42, 46 (1930), where it is said that twenty-four states have squarely considered and rejected the federal rule of exclusion.

See, also, 22 C. J. S., § 657b, pp. 1006–1008: "In the absence of a provision in the organic or statutory law expressly rendering the evidence inadmissible, the rule in the majority of jurisdictions is that evidence obtained by an unlawful search and seizure in violation of constitutional or statutory provisions * * * is nevertheless admissible. This is the rule in some jurisdictions where formerly such evidence was incompetent against accused."

Cf., *inter alia,* 8 Wigmore, ***Evidence*** (3d ed.) §§ 2183, 2184, notes, pp. 5–34; Wharton's ***Criminal Evidence*** (11th ed.), § 373, notes, pp. 590–597; Cornelius, ***Search and Seizure*** (2d ed.), § 7, pp. 36–39; Atkinson, *op. cit.,* pp. 764–774; 22 C. J. S., § 657b, pp. 1006–1032; annotations, 24 A. L. R. 1411; 32 A. L. R. 408; 41 A. L. R. 1147; 52 A. L. R. 480; 88 A. L. R. 351; 134 A. L. R. 820; 150 A. L. R. 566; 5 Jones, ***Commentaries on Evidence*** (2d ed.), §§ 2075–2081, pp. 3865–3884.

Of particular relevance to the immediate problem, is the conflict among the states as to the admission in state criminal proceedings of evidence obtained through an illegal search and seizure by federal officers. As might be expected, states which follow the common law rule of admissibility with respect to evidence illegally obtained by state officers, also admit in state criminal proceedings evidence illegally seized by federal officers. Such is the rule, for example in Louisiana, Nevada, North Dakota and Pennsylvania.[19] Illinois, Tennessee and Montana, which exclude evidence illegally seized by state officers, admit evidence illegally seized by federal officers.[20] On

[19] *State* v. *Breaux*, 161 La. 368, 373–74, affirmed, *Breaux* v. *Louisiana*, 273 U. S. 645; *State* v. *Hebert*, 158 La. 210, 212; *Terrano* v. *State*, 59 Nev. 247; *Commonwealth* v. *Colpo*, 98 Pa. Super. 460, certiorari denied, 282 U. S. 863; *State* v. *Lacy*, 55 N. D. 83.

[20] *People* v. *Touhy*, 361 Ill. 332, certiorari denied, 303 U. S. 657; *Hughes* v. *State*, 145 Tenn. 544, 551; *Johnson* v. *State*, 155 Tenn. 628, 630; *State* v. *Gardner*, 77 Mont. 8; *State ex rel. Kuhr* v. *District Court*, 82 Mont. 515.

the other hand in Wyoming, Missouri and Kentucky, which also hold inadmissible evidence illegally seized by state officers, the admissibility of evidence secured by federal officers depends upon whether the search and seizure was violative of the Fourth Amendment to the federal constitution, on the ground that the states are bound by the federal constitution and it is part of the function of the state courts to enforce the federal constitution as the supreme law of the land.[21] Idaho and Mississippi, also "exclusion" states, have held evidence inadmissible when illegally obtained by federal officers, but it is not made entirely clear whether the legality of the search is to be tested by state law or federal law,

[21] *State* v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2; *State* v. *Rebasti*, 306 Mo. 336, 267 S. W. 858; *State* v. *Horton*, 312 Mo. 202, 278 S. W. 661, error dismissed, 271 U. S. 690; *Walters* v. *Commonwealth*, 199 Ky. 182, 187, 250 S. W. 839; *Roberts* v. *Commonwealth*, 206 Ky. 75, 266 S. W. 880; cf. *Ingram* v. *Commonwealth*, 200 Ky. 284, 254 S. W. 894; *Caudill* v. *Commonwealth*, 202 Ky. 730, 261 S. W. 253; *Vick* v. *Commonwealth*, 204 Ky. 513, 264 S. W. 1079.

Generally those states following the federal rule of exclusion also follow the rule of *Burdeau* v. *McDowell*, *supra*, admitting evidence illegally seized by private individuals. *Davidson* v. *Commonwealth*, 219 Ky. 251, 253, 292 S. W. 754; *Cutrer* v. *State*, 161 Miss. 710, 713, 138 So. 343; *State* v. *Steely*, 327 Mo. 16, 19, 33 S. W. 2d 938; *State* v. *Wilkerson*, 349 Mo. 205, 211–213, 159 S. W. 2d 794; *State* v. *Hepperman*, 349 Mo. 681, 697, 162 S. W. 2d 878. But cf. *Lowry* v. *State*, 42 Okla. Cr. R. 326, 276 Pac. 513, where evidence was held inadmissible because seized by mob action of private individuals while the defendant was in custody of state officials.

or both.[22] In Wisconsin, which excludes evidence illegally seized by state officers, the question of the admissibility in state criminal trials of evidence illegally obtained by federal officers, has been expressly left open.[23]

Although generally the state courts limit their discussions to the effect of the state constitutional provisions governing searches and seizures, a few have considered the due process question under the state and federal constitutions. The due process issue was fully discussed in *McIntyre* v. *State*. 190 Ga. 872, 878–879, 11 S. E. 2d 5, certiorari denied, 312 U. S. 695, where the Georgia court said:

> There are also many decisions by the Supreme Court of the United States and by the United States Circuit Courts of Appeals, involving trials in Federal courts, in which, although the 14th Federal amendment was not involved, the nature of the protection against unlawful searches and seizures and compulsory self-incrimination was considered and decided, and which seem clearly to recognize that such protection is not of "the very essence of a scheme of ordered liberty," or "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," under the test stated in the

[22] *Little* v. *State*, 171 Miss. 818, 822–823, 159 So. 103; *State* v. *Arregui*, 44 Ida. 43, 254 Pac. 788.

[23] *Novak* v. *State*, 185 Wis. 616, 618.

> Palko case, supra. While it is true that the Federal courts have applied in their own tribunals a rule, as to evidence obtained by Federal officers in violation of the 4th and 5th Federal amendments, different from that obtaining in this State with respect to evidence obtained by State officers and used in State-court trials, the Federal courts have nevertheless, even in cases tried in their own tribunals, consistently recognized that the Federal government may avail itself of evidence obtained by *State* officers, even though such evidence may have been obtained by unlawful search and seizure. These decisions draw the distinction, already stated, between the limitations of the 4th amendment in its different spheres of operation on the Federal government and the States.

Cf. *Johnson* v. *State,* 152 Ga. 271; *Hysler* v. *State,* 148 Ga. 409; *Martin* v. *State,* 148 Ga. 406, 407; *Groce* v. *State,* 148 Ga. 520; *Croft* v. *State,* 73 Ga. App. 318, 321; *Griggs* v. *State,* 29 Ga. App. 212 (headnote).

The applicability of the due process concept was also fully considered in *People* v. *Gonzales,* 20 Cal. 2d 165, 169, 124 P. 2d 44, certiorari denied, 317 U. S. 657, where the court said:

> Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any

person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the Federal Constitution, however, fall within the concept of due process of law. * * * In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. * * * While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a

> confession obtained by coercion or torture * * * *, it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. * * * The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. * * * The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."

Cf. *People* v. *Kelley,* 122 P. 2d 655, 659–660 (Cal. App.), affirmed, 22 Cal. 2d 169, 137 P. 2d 1, appeal dismissed, 320 U. S. 715, rehearing denied, 321 U. S. 802; *City of Columbus* v. *Smith,* 78 Ohio App. 66, 65 N. E. 2d 716, followed in *City of Columbus* v. *Meadley,* 78 Ohio App. 490, 65 N. E. 2d 719, and *City of Columbus* v. *Treadwell,* 65 N. E. 2d 720, 722; *Banks* v. *State,* 207 Ala. 179, 93 So. 293, certiorari denied, *Ex parte Banks,* 207 Ala. 503, 93 So. 472, certiorari denied, 260 U. S. 736.

In construing the "due process" concept, early British experience is of special relevance (*Crane* v. *Hahlo,* 258 U. S. 142, 147), particularly where,

as here, the British rule has been widely adopted in the United States (*Powell* v. *Alabama,* 287 U. S. 45, 65; *Tumey* v. *Ohio,* 273 U. S. 510, 523). As we have seen (*supra,* p. 31), the "solicitous care of English courts concerning the 'liberty of the subject'" (Frankfurter, J., dissenting in *Harris* v. *United States,* 331 U. S. 145, 170) permits the introduction of illegally seized evidence in criminal trials. Similarly, in construing the guaranties of the federal constitution with respect to searches and seizures, the views of the Massachusetts court are of special significance because the Massachusetts provision is the forerunner of the Fourth Amendment[24] (*Ibid.,* p. 161). *Commonwealth* v. *Dana,* 2 Metc. (Mass.) 329, is generally referred to as the leading early American case establishing the rule of admissibility. In 1923, in *Commonwealth* v. *Wilkins,* 243 Mass. 356, 138 N. E. 11, the Supreme Judicial Court of Massachusetts reconsidered the interpretation of its constitutional provision in the light of this Court's decision in the *Weeks* case, and unani-

[24] For a discussion of the American precursors of the Fourth Amendment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press, 1937), pp. 79 ff., 82: "Massachusetts was next in line with Article 14 of the Declaration of Rights of 1780. Its more elaborate wording was not taken from any of the other constitutions and offered the first expression of the phrase 'unreasonable searches and seizures' which ultimately found its way into the Fourth Amendment."

mously reaffirmed its established rule of admissibility. And later in the same year, again by a unanimous court speaking through Chief Justice Rugg, the Massachusetts court held that the admission in evidence of illegally seized liquor did not violate the defendant's rights under the due process clause of the Fourteenth Amendment to the federal Constitution. *Commonwealth* v. *Donnelly,* 246 Mass. 507, 141 N. E. 500, certiorari dismissed, 267 U. S. 603. The court referred to the earlier opinion of Mr. Justice Holmes in *Commonwealth* v. *Welch,* 163 Mass. 372, 40 N. E. 103, announcing the admissibility rule.

The New York experience is also illuminating. Cf. Frankfurter, J., dissenting in the *Harris* case, *supra,* at 160. Prior to 1939, New York was alone among the states in having no constitutional guaranty against unreasonable searches and seizures, its corresponding guaranty being merely statutory. In the course of its deliberations, the New York Constitutional Convention, which prepared the new state constitution containing a guaranty against unreasonable searches and seizures, after much debate, rejected a proposal that the new constitution specifically provide that:

> Any evidence secured or obtained in violation of this section shall be inadmissible upon any trial, civil or criminal, or in any proceeding whatsoever.

The New York Court of Appeals, in an opinion by Chief Judge Lehman reviewing the history of

the rule in New York, held that the rule of admissibility remains intact under the new constitution. *People* v. *Richter's Jewelers,* 291 N. Y. 161, 51 N. E. 2d 690. To the same effect are *People* v. *LaCombe,* 170 Misc. 669, 9 N. Y. Supp. 2d 877; *People* v. *Kuhn,* 172 Misc. 1097, 15 N. Y. Supp. 2d 1005.

It should also be noted that New Jersey, which has consistently admitted evidence obtained through illegal search and seizure (*supra,* p. 3 n. 1), has recently put into effect its new constitution in which the search and seizure provision is phrased exactly as in its former constitution. Thus, in recent years, the people of two states have revised their constitutions without feeling obliged by their sense of fair play and "ordered liberty" to provide for the exclusion of evidence obtained by illegal searches and seizures.

We submit that the fact that so many jurisdictions over such a long period of time, have, after examining the matter, decided that evidence illegally seized can be admitted in criminal prosecutions, in itself demonstrates that its admission does not violate due process of law.[25] The tradition of Anglo-American jurisprudence is itself of the essence of the concept of due process. It

[25] If, as has been held by this Court, a person may, consistent with the federal constitution, be tried in a criminal case after having been brought into the state of trial by illegal abduction, it can hardly be said that merely introducing evidence illegally seized from a criminal defendant vio-

is hardly conceivable that any rule which had secured the repeated and well-considered approval of so many eminent British and American jurists, in practically every area of the English speaking world, could now be considered a violation of a right which is "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut, supra,* at 325. We are aware of no case in which this Court has held to be a violation of due process of law any procedure which had been so widely approved and so deeply rooted in the fabric of law and in the mores of so many states, all with their own historical heritages of constitutionally guaranteed liberties. That the federal government and some states adopt stricter rules to implement specific rights of their citizens certainly does not establish that ordered society, with proper respect for human dignity and decency, could not exist without the more rigid rules. The following language of the Court in *Twining* v. *New Jersey, supra,* 211 U. S. at 113–114, though concerned with the privilege against compulsory self-incrimination, is fully relevant here:

> There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege

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lates his "natural rights." *Ker* v. *Illinois*, 119 U. S. 436, 444; *Mahon* v. *Justice*, 127 U. S. 700, 715; *Cook* v. *Hart*, 146 U. S. 183; *Lascelles* v. *Georgia*, 148 U. S. 537, 543; *Pettibone* v. *Nichols*, 203 U. S. 192, 208. Cf. *Adams* v. *New York*, 192 U. S. at 596.

> within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that State made the same ruling.

If, as we believe is so, it does not violate due process of law for a state court to admit relevant and competent evidence obtained by an illegal search and seizure by officers of the same state, *a fortiori* there can be no sound reason for depriving the federal government of the use of such evidence, secured without complicity or wrongdoing by the federal government. It would be most anomalous to hold that evidence admissible in the courts of the jurisdiction whose own officers had violated a party's rights was inadmissible in the courts of a separate jurisdiction whose officers were entirely innocent of any wrongdoing.

The rationale of this Court in the *Weeks* case and in subsequent cases excluding illegally seized

evidence does not require or tend to support such a conclusion. As we read the cases, the federal exclusion rule appears to be based on the grounds (1) that, as a matter of ethics, the Government should not be permitted to avail itself of the fruits of the wrongdoing of its own servants and agents, and (2) that the exclusion of the evidence is the only really effective means of implementing the protection assured by the Fourth Amendment.[26] Neither ground has any relevance to the problem here under consideration.[27] First, the injury, i. e., the search and seizure which constituted whatever invasion of petitioner's rights there may have been, was not the act of any federal agent.[28] As to the

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[26] In *Goldstein* v. *United States*, 316 U. S. 114, 120, this Court explained the basis of the *Weeks* exclusion rule as follows: "It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection. This, for the reason that otherwise the policy and purpose of the amendment might be thwarted."

[27] Atkinson, *op. cit.*, p. 33, 23 Mich. L. R. 748, has said: "The holding may be justified upon two theories, *viz.*, (1) that the admission of the evidence substantially violates the rule against self-incrimination in the Fifth Amendment, (2) that the exclusion of the evidence is the only practical means of enforcing the guarantee against unreasonable searches and seizures." As we have shown above, however, the Fifth Amendment guaranty against testimonial compulsion is not involved.

[28] We concede, of course, that if the Court should determine that there was such participation by a federal officer as to make the search and seizure a joint federal-state enterprise, the evidence was inadmissible.

function of the exclusion rule as an implementation of the Fourth Amendment, it is sufficient to repeat that the Fourth Amendment is not here involved. The Fourth Amendment inhibits unreasonable searches and seizures only by federal officers. Whatever rights of petitioner may have been violated by the search and seizure were not rights secured by the Fourth Amendment.

At this point the argument might be made that the search and seizure violated petitioner's rights under the due process clause of the Fourteenth Amendment, and the evidence secured thereby should be excluded as a means of implementing this constitutional guaranty. We submit, however, that there is no warrant for so extending the rule of exclusion. As previously noted, this Court has never held that the immunity against unreasonable searches and seizures is an element of due process. That it is a right sufficiently important to be specifically protected against state invasion by state constitutions and against federal invasion by the federal constitution does not render it necessarily a "natural right of man." Cf. *Twining* v. *United States, supra,* at 99 ff.; *Palko* v. *Connecticut, supra; Adamson* v. *California, supra,* at 54–55; state cases discussed *supra,* pp. 37–40.

Further, we submit that even if the immunity were to be considered one of the elements in the concept of due process of law, the exclusion of

evidence acquired in disregard of the immunity should not follow. The violation of due process of law was not the act of the federal government; yet the public interest of the federal government would be the sufferer if the evidence were excluded. When state and municipal officers secure evidence, they are not motivated by the probability or possibility of securing evidence of federal crimes. Thus, to announce a rule of exclusion of state-secured evidence in federal prosecutions would not tend to deter similar acts by state and municipal officers in the future. The only practical result of such a rule would be that in many cases, often critical ones, in which state and municipal officers discovered evidence of federal offenses which federal officers had not yet unearthed, federal rights could never be vindicated and guilty persons would go unpunished, free to prey on the community.

Manifestly, the admission of the evidence *per se* does not constitute a violation of due process of law within the ambit of the Fifth Amendment, and it is only in presenting the evidence, innocently come by, that the federal Government is involved. If due process is involved at all, it is only at the time of the search and seizure. Since the search and seizure was by state officers, the only due process clauses conceivably relevant

would be those of the Fourteenth Amendment and of the state constitution. Neither of these, however, controls the action of federal officers. Although the privilege against self-incrimination is not involved in this case (*supra*, pp. 16–20), we believe the rationale of the *Feldman* case, *supra*, is fully applicable in the present situation. In his dissenting opinion, Mr. Justice Black said (p. 498):

> The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will.

This question the majority of the Court answered in the affirmative. If we substitute the simple word "evidence" for the phrase "self-incriminatory testimony" in the question stated by Mr. Justice Black, we cover the problem of the instant case. We submit that the Court's affirmative answer in that case is *a fortiori* proper here.

CONCLUSION

For the reasons stated, we submit that the legality of the search and seizure, being a totally non-federal enterprise, is irrelevant to the admissibility of the evidence secured thereby

in the federal criminal prosecution. Accordingly, the judgment of the Court of Appeals should be affirmed.

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